SQUIRE, SANDERS & DEMPSEY (US) LLP

One Tampa City Center
201 N. Franklin Street, Suite 2100
Tampa, FL 33602

Office: +1.813.202.1300
Fax: +1.813.202.1313

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

February 22, 2011

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

Re: Comments to Proposed Rule Regarding Registration of Municipal Advisors, SEC Release No. 34-63576; File No. S7-45-10

Dear Ms. Murphy:

This letter is submitted on behalf of Squire, Sanders & Dempsey (US) LLP (the "Firm"), a law firm that has had an active public finance practice for more than 100 years. The national scope of the Firm's practice includes experience with virtually all levels of state and local governments in over 40 states, including states, state agencies, boards and commissions, counties, municipal corporations, townships, school districts, regional and special districts and colleges and universities. Our clients include a diverse cross-section of public finance market participants, including governmental issuers, nonprofit health care providers, higher education and cultural institutions and for-profit beneficiaries of municipal financing. We also count among our clients most, if not all, of the major investment banking firms as well as regional banking firms and traditional lending institutions.

The diversity of our practice, conducted by more than 55 lawyers nationwide, provides us with a prismatic view of the municipal securities industry. It also promotes robust internal discussion of the current issues affecting our clients and our practice. Additionally, from time to time, Firm attorneys have been appointed as board members of municipal securities issuers. It is against that backdrop that we provide the Commission with our comments regarding the proposed rules regarding registration of municipal advisors. We are limiting our comments to just two areas of the proposed rules, the disparate treatment of appointed public officials and obligated persons, and the limited exclusion of attorneys from the proposed rules. We feel these two areas will most greatly affect us (and our clients).

First, with respect to the proposed disparate treatment of appointed versus elected officials of municipal entities, we respectfully suggest that the Commission was, perhaps, misinformed regarding the level of accountability to which appointed public officials have within their respective jurisdictions. As of the date of this submission, there have been numerous (in excess of 100) comments submitted by various individuals and groups addressing this key issue.

We hope those comments provide to the Commission a better and more complete understanding of the important role citizen volunteers play by serving on the appointed boards of municipal entities. By and large, the appointed members of governing bodies of municipal entities are directly accountable under state law for their actions and behavior – to both the municipal entity and its citizens. In most, if not all, states, appointed public officials are subject to the same state ethics and conflict of interest laws as elected officials. Very little distinction is made within the state ethics and conflict of interest laws between appointed and elected officials because all public officials are held to the same high standard of conduct. As a public official, each board member – whether appointed or elected – already owes a fiduciary duty under state law to his or her municipal entity and is specifically subject to state laws concerning conflicts of interest, solicitation and acceptance of gifts, public meeting and record requirements, financial disclosure and doing business with one's agency. We agree with the comments previously submitted that there is no basis for distinguishing between elected and appointed officials serving on the boards of municipal entities or supporting committees.

Similarly, just as the municipal entity cannot act but through its employees and board, whether appointed or elected, so also an obligated person can only act through its board of trustees or directors and employees. Yet the proposed rule exempts employees of municipal entities but not board members or employees of obligated persons. We believe that boards and employees of obligated persons should be excluded from the rule when the advice being rendered is to the obligated person. A clear distinction needs to be made between those who are the intended *recipients* of municipal advisory services and those who are the *providers*. Board members of municipal entities – whether elected or appointed – as well as board members and employees of obligated persons are *recipients* of municipal advice, not *providers* of municipal advice to the municipal entity or obligated person, and therefore should not be required to register as municipal advisors.

We therefore join our clients and others in respectfully requesting that the Commission (1) eliminate the disparate treatment of appointed board members of municipal entities, (2) eliminate the disparate treatment of board members and employees of obligated persons and (3) provide clear and unconditional guidance that statements and other activities of board members (whether elected or appointed) of municipal entities or obligated persons, or employees of obligated persons, made or taken in the course of performing their respective duties as board members or employees will not be construed as "providing advice" in the role of a "municipal advisor" to a municipal entity or obligated person, so as to require prior registration by the individual with the Commission.

Additionally, we believe much of the confusion and angst regarding the proposed rules can be resolved by the Commission's provision of specific guidance as to what it means for one to "provide advice" covered by the rules. That guidance should make it clear that (1) the advice must be provided to a municipal entity or obligated person in a professional capacity by an unrelated person holding himself or herself out to have special knowledge and expertise in

municipal financial matters, and (2) there must exist a reasonable expectation or likelihood that the advisor's professional advice will be relied upon by the board or employees of the municipal entity or obligated person in making financial decisions. The elements missing in the proposed rule are the lack of any requirement that the advisor act and hold himself or herself out to the public as acting in a professional capacity and possessing special expertise in the area in which he or she is providing advice, and the absence of any requirement that there be a reasonable expectation or likelihood that the municipal entity or obligated person receiving the advice will view the person rendering it to be acting in a professional capacity as a financial advisor, with the knowledge, experience and competence to make the advice reliable. To omit these elements will subject to registration as a "municipal advisor" anyone who offers an opinion or view on such matters to a municipal entity or obligated person, including board members and employees of obligated persons, and even members of the general public filing written comments or making oral statements at a board meeting.

Second, in addition to the specific guidance regarding what constitutes "providing advice," we offer the following comments regarding the exclusion of attorneys from the operation of the proposed rules and the scope of "legal advice" and "services that are of a traditional legal nature".

At the outset, it is our position that attorneys providing legal services in connection with a municipal finance transaction, including the issuance of municipal securities or the negotiation of documents relating to financial products, should have an unfettered ability to provide those services without concern as to whether their participation in the transaction may be viewed by the Commission in hindsight to have crossed an imaginary line drawn by the Commission between legal and financial advice. We believe that certain advice and services the Commission may identify as financial in nature are in fact an integral part of and inseparable from legal advice and services that attorneys have traditionally been expected to provide to their clients in connection with municipal finance transactions, *i.e.*, they are "traditional legal services." For example, we are often called upon by our clients to provide advice or to evaluate the advice of others concerning all aspects of a municipal finance transaction, including the feasibility of a project and the advantages of a particular structure over another. We are concerned that certain aspects of this advice, if viewed in isolation and outside the broader context of the overall advice and services clients expect their attorneys to provide on municipal financing transactions, this advice could be deemed by the Commission to be "financial advice." However, as noted, consideration and comment on such matters is essential to the provision of the competent and complete legal advice and services we and other attorneys should provide and traditionally have provided in connection with municipal finance transactions.

As attorneys, we already have a fiduciary duty to our clients under the Rules of Professional Conduct of the laws of the states in which we are admitted to practice. Additionally, most if not all states also have well-established disciplinary processes to sanction attorneys who breach their fiduciary duties to their clients. Moreover, attorneys are liable to

their clients for damages caused by breach of their fiduciary duties. These legal duties, sanctions and liabilities apply to attorneys regardless of whether the scope of their services step over that imaginary line envisioned by the Commission as to what constitutes legal and financial advice.

We believe this exception from the rule for advice provided by attorneys should apply regardless of whether our client is a municipal entity, an obligated person, an underwriter, a letter of credit bank, a bond trustee or any other party to a municipal financing transaction and regardless of whether the advice is provided only to our client or shared with other transaction participants. As part of a "working group" on a municipal transaction, attorneys generally do not limit their comments and recommendations to those that serve their particular clients. The nature of working group relationships is dynamic. All parties are working in concert toward a common goal – that of a financially sound and legal financing structure – and advice and comment is often freely shared within the working group, subject to due consideration of the existence of the attorney-client relationship and the ethical duties that an attorney owes its client. This willingness to raise issues, where persons other than one's client may have an interest in them, *e.g.*, disclosure issues, is the sort of behavior and responsibility that lawyers involved in municipal finance transactions have been urged to assume. As observed in another comment letter, the Commission's proposed rules create a situation in which, as to financial aspects of a municipal finance transaction, a lawyer may need to have registered with the Commission as a municipal advisor or remain silent.

Further, we submit that the exemption from the proposed rules for attorneys providing legal advice should apply whether or not there is an attorney-client relationship between the attorney and the municipal entity. As noted in other comment letters, legal services engagement letters between a municipal entity and a law firm typically state that the engagement ends upon closing of the bond transaction. However, we are often requested to provide our view or advice (legal and sometimes non-legal) on matters relating to prior transactions for which we served as bond counsel or in another legal capacity. This means that at the time these new services or advice are rendered, there may not be a formal attorney-client relationship.

Additionally, we urge the Commission to consider the amount of information that an attorney or law firms provide, without compensation, to municipal entities and other participants in the municipal marketplace through speaking at conferences and education seminars, and preparing and distributing newsletters and alerts of developments – including legal, tax, legislative, financial and political developments. Should the rules be finalized as proposed, lawyers will be forced to review these uncompensated educational activities to determine whether they constitute "providing advice" under the rule and, if continued, will require registration with the Commission as a "municipal advisor". We believe that in many instances law firms will curtail providing such educational materials and services to avoid in engaging in regulated conduct and the necessity and burdens of registering with the SEC. This will deprive many municipal entities of one of the primary methods for receiving current information

regarding the municipal market. It will also deprive regulators, such as the Commission, of an effective means of disseminating important developments. No public benefit will be gained from curtailing such educational activities by attorneys.

We also observe that imposing a federal fiduciary duty upon an attorney with respect to a non-client municipal entity or obligated person will create an impossible ethical dilemma with regard to conflict of interest issues under state professional conduct rules that already impose a prior and competing fiduciary duty in favor of the attorney's client.

Once the Commission views these matters from the broader perspective we have described in this letter and that others have described in separate comment letters, it should be clear that allowing the free flow of discussion, debate and opinion among the entire working group in a public finance transaction is something to be encouraged rather than restrained with uncertain and ambiguous regulation.

In conclusion and to summarize, for the foregoing reasons, we respectfully request that the Commission specifically modify the proposed rules as follows:

1. exclude from the definition of "municipal advisor" all board members of a municipal entity, whether elected or appointed, and all board members and employees of obligated persons;

2. provide specific guidance with respect to what it means to "provide advice" by requiring that the advice be provided to a municipal entity or obligated person in a professional capacity by an unrelated person holding himself or herself out to have special knowledge and expertise in municipal financial matters and that there be a reasonable expectation or likelihood that the advice will be relied upon by the board or employees of a municipal entity or obligated person in making financial decisions for the municipal entity or obligated person;

3. provide clear and unconditional guidance that statements and other activities of board members (whether elected or appointed) of municipal entities or obligated persons, or employees of obligated persons, made or taken in the course of performing their respective duties as board members or employees will not be construed as "providing advice" in the role of a "municipal advisor" to a municipal entity or obligated person requiring prior registration by the individual with the SEC; and

4. exclude attorneys from the application of the proposed rules when the attorney is providing legal advice or services, including ancillary financial or related advice or services relating to a municipal finance transaction or municipal financial product, or providing information concerning developments in the municipal marketplace.

If you have any questions concerning these comments or desire any additional information regarding the Firm, please contact Alexandra M. MacLennan at (813) 202-1300 (or sandy.maclennan@ssd.com) or D. Bruce Gabriel at (216) 479-8500 (or bruce.gabriel@ssd.com).

Respectfully submitted,

Alexandra M. MacLennan
Chair, Disclosure Group

D. Bruce Gabriel
Practice Group Leader
Public and Infrastructure Finance Group