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Via Electronic Mail: rule-comments@sec.gov

Elizabeth M. Murphy
Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: SEC File Number S7-45-10
Release No. 34-63576

Dear Ms. Murphy:

On behalf of the State of Alabama, the Office of the Attorney General and the Alabama Securities Commission (ASC) are pleased to respond to the Commission's request for comment on proposed rules relating to the registration of municipal advisors as set forth in Release No. 34-63576 (the "Release").

The governing bodies of many State agencies, commissions and authorities that would constitute a "municipal entity" and appear to be included within the meaning of Section 15B of the Securities Exchange Act of 1934, as recently amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") are represented by Alabama Assistant Attorneys Generals. With regard to certain Industrial Revenue Boards or Authorities, the ASC under Alabama State law is required to review an application and issue a No Stop Order before any issuance can be completed. In

addition, municipalities depend upon the citizens of the community to help facilitate and run many governmental functions through various boards and committees. These citizens give their time, expertise and common sense to enable their municipality to plan and zone for development, to provide for recreational opportunities, to administer utility services, to provide for industrial and economic development opportunities and to facilitate many other facets of local government.

The Act requires that "municipal advisors" register with the Commission and become subject to related requirements imposed by statute and regulation. Section 15B specifically excludes a "municipal entity" and the employees of a "municipal entity" from the definition of "municipal advisor." In the Release, the Commission extended the exclusion to elected members of a governing body of a "municipal entity" as well as ***ex officio*** members who sit on a board by virtue of holding a certain elective office. However, the Commission took the interpretive position that an "appointed" member of a governing body of a "municipal entity" would not be covered by the exclusion from the definition of "municipal advisor." The Commission's stated rationale for the distinction between elected or *ex officio* members and appointed members is that the Commission staff believes that appointed members are not directly accountable to citizens for their actions and performance as a member of the governing body of a municipal entity.

While the issue of insufficient regulation may be true for the municipal activities of brokers, dealers and investment advisors, municipal and board appointed members, however, are already subject to strict fiduciary duties and state ethics and financial reporting requirements. Further, appointed members, and other similarly situated (collectively hereafter "appointed members") ordinarily operate in the "sunshine" since their activities are generally conducted at "open and public meetings", where agendas are published, minutes are kept, and public participation welcomed.[1] Because appointed members oversee taxpayer and member dollars and are responsible for the security of their communities and participants, appointed members and board participants have a vested interest in their activities.

We believe that the rules as proposed have unintended consequences for public boards, and for the citizens of states and municipalities, including (1) deterring citizens from serving on public boards, (2) chilling debate, deliberation and advocacy among members of public boards, (3) interfering with the rights of a State and its executive or other appointing body to determine appropriate qualifications for members of governing bodies, (4) unfairly burdening certain public employees with registration and compliance requirements while exempting others from such burdens, and (5) unfairly burdening any public board member with registration and compliance costs and obligations, and associated liability for potential noncompliance, simply because the board member is fulfilling his or her duty to make decisions and set policy in accordance with responsibilities to manage and administer the business of a public board. These unintended consequences are not aligned with the goals of the Act or the Commission's focus on the orderly regulation of market participants and the protection of investors.

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[1] Act 2005-40 is codified as Section 36-25A-1, *et seq*.

When Congress exempted the municipal entity and its employees from the definition of "municipal advisor," we believe it did so with the express intent to include all of the entity's officers and employees, including its volunteer board members within that exemption. To do otherwise creates the anomalous result that the proposed regulation seeks to bring into the concept of "advice" those discussions by board members on investment objectives when those discussions involve decision-making debates by issuers. Requiring registration for those who participate in those discussions chills informed analysis and debate - exactly the opposite result the SEC should be seeking. The SEC is mistakenly failing to recognize that members of governing bodies and other state and local officials are the personnel that operate the municipal entities. The "municipal advisors" serve those officials. It confuses the issue to suggest that those officials—the very intended beneficiaries of municipal advisor regulation—somehow are "municipal advisors" themselves.

The proposed regulations turn on its head the concept of "advice" and transform decision makers of entities who should be receiving advice into "advisors". To be fair, the Commission identifies past instances of misconduct to justify its need to regulate pervasively. Nevertheless, municipal finance statistics suggest that there are far fewer instances of violations and misconduct than in the area of private finance where the Commission already regulates pervasively. The current economic situation has devastated state and local government budgets, but there are far fewer defaults and municipal bankruptcies than the number of banks taken over by the FDIC. In short, virtually every state and local government subjects itself to a transparency that surpasses that of the Commission's exemplary efforts at transparency through a combination of public information and public meeting laws and extensive reporting through the media to their stakeholders. These are coupled with an accessibility that fosters immediate individual contact with those concerned stakeholders.

We further submit that in their fiduciary roles of administering their various duties, these appointed members ordinarily only serve on a part-time basis. As a general rule, these appointees have full-time jobs which are often separate and distinct from the additional role that they perform. Depending on the size of the municipality or scope of the board, as the case may be, meetings are frequently conducted on a quarterly (or monthly) basis with special meetings scheduled as needed. For this reason, appointed members, by necessity, delegate their duties to investment and other professionals who report back to the board members at the scheduled board meeting. For example, the Uniform Prudent Investor Act, which has been adopted by numerous jurisdictions, expressly authorizes delegation of asset management to professional managers, who are already subject to SEC registration and regulation. *See*, The New Prudent Investor Rule and The Modern Portfolio Theory: A New Direction for Fiduciaries,: *34 Am. Bus. L.J. (Fall 1996). See also* Section 90, Restatement 3d of Trusts (2007) and comments.

It should also be recognized that as a general rule, these board appointees are not making discrete tactical decisions to invest in any particular security. Rather, they make macro level decisions to hire and fire professional money managers, along with asset allocation and related administrative decisions. Such decisions are made pursuant to pre-established investment policies/investment guidelines, and state rules and regulations. Accordingly, these appointed members are ordinarily not providing investment advice to their municipal entity or board. To the contrary, they are charged with seeking, receiving and implementing investment advice that they receive from registered investment advisors. The Proposed Rules exempt investment advisors from registration requirements under Dodd-Frank since the Investment Adviser's Act of 1940 already covers their activities. *See* 240.15Ba1-1(d)(2)(ii) and the Release at page 20-21.

We therefore respectfully submit that the Commission's interpretation of the application of the definition of "municipal advisor" is overly broad with respect to members of the governing bodies of Alabama's agencies, commissions and authorities. We urge the Commission to make clear in the final rules that a member of a governing body of a "municipal entity" shall not be deemed to "give advice," and therefore does not meet the definition of a "municipal advisor," simply because the member engages in discussion, debate, policy making or decision making relating to investment matters in connection with the member's duties as a member of the governing body.[2]

The Commission's discussion of "advice" has highlighted the following types of activities in this context: advice relating to the issuance of municipal securities or swap transactions, guaranteed investment contracts, and investment strategies (including advice with respect to the structure, timing, terms, and other similar matters concerning such issues or financial products). Debate, discussion and review of investment matters and policies – the foundation of the responsible exercise of a governing body's governance responsibilities and duties – do not constitute "advice" and should not be interpreted as such. Members of public boards, in exercising their authority as decision makers and policy makers, generally are not engaged in offering advice with respect to structure, terms "or similar matters" concerning financial products or the investment of assets. Deliberation and discussion among board members relating to investment issues cannot be equated with "advice" rendered by market professionals. We believe the Commission must clarify this in the final rules relating to the registration of municipal advisors," to eliminate confusion about the scope of activities that constitute "advice."

[2] The application of the definition of "municipal advisor" is particularly inapposite when the governing body is advised on investment matters by a third party that is subject to regulation under federal securities laws.

And as previously stated, a “municipal entity” is excluded from the definition of “municipal advisor.” A “municipal entity” can act only through its governing body or employees to whom authority has been delegated. The governing body should be viewed as the functional equivalent of the “municipal entity” for purposes of analysis of the scope of the term “advice.” A governing body does not “give advice to itself.” Rather, a governing body deliberates and makes decisions on the basis of information available to its members. As numerous comment letters have noted, the proposed regulations have the effect of “turning on its head” the concept of "advice" and inadvertently transforming decision makers into advisors, with the result that very likely “chills informed analysis and debate --exactly the opposite of the result the SEC should be seeking to encourage.”

Therefore, in the State, board members are not "advisors" in the commonly understood sense of the word; rather, they have a specific fiduciary duty to provide direct oversight over the workings of their authorities. Board members are, under law, expected to understand, review and monitor the implementation of an agency's fundamental financial and management controls and operational decisions. This is not an "advisory" role. Board members and the municipal entities on which they serve, whether elected or appointed, are one and the same, not only for practical, operational purposes, but for formal legal purposes: Any definition of "municipal advisor" that includes a board member leads to the odd result that a board member is advising himself.

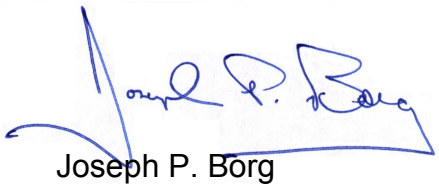
In Alabama, as is the case in many states, the composition of and qualifications for membership on the governing body of various “municipal entities” are set forth in State law specifically. In some instances, the Governor may have more general authority under State law to make appointments of members of governing bodies. Because the Commission would have authority to reject or deny the registration application of a board member or trustee of a State agency, commission or authority if the rules are adopted as proposed, an impermissible conflict between the Commission’s rules and State law would result. We do not believe that the Act, as amended to include the new “municipal advisor” provisions, was intended to permit the Commission to override appointments made under State law or to insert into State law additional qualifications for membership on the governing body of a “municipal entity” in any state or local jurisdiction.

The interpretation if maintained is that the Commission could be viewed as having given itself a veto over members of State boards appointed under State law. This would create a significant constitutional issue concerning the validity of the regulation. We do not believe that Congress, or the Commission meant to tread into this constitutional territory.

In summary, all board members are accountable to their authorities and to the people of the State for their actions on their respective boards. There is no distinction between appointed and elected members. Board members are required to act in the best interests of the entity they serve and its public purpose. For the foregoing reasons, we urge the SEC to reconsider the approach taken towards board members in the Proposed Release. We recommend that the SEC provide for a specific exclusion from the definition of municipal advisor for all board members of municipal entities.

Thank you for your consideration.

Very truly yours,



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