

# GROOM LAW GROUP

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Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

Attn: Elizabeth M. Murphy

Re: File No. S7-45-10  
Registration of Municipal Advisors

Dear Sir or Madam:

On behalf of the State Board of Administration of Florida ("SBA"), we submit the following comments with respect to the Commission's proposed rule requiring the registration of "municipal advisors" pursuant to section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010). The SBA is authorized by Florida statutes to invest and manage the funds of the Florida Retirement System and certain other Florida municipal funds.

We sympathize with the Commission's goal of increasing transparency with regard to the parties who influence the investment of municipal funds; however, we believe that the proposal significantly exceeds the intended scope of the legislation and reflects a fundamental misunderstanding of the structure and governance of public funds.<sup>1</sup> In particular, we suggest that, as a result, the proposed definition of "municipal advisor" sweeps too broadly in its inclusion of persons who serve on public retirement system (and similar) governance and advisory boards. Municipal board members, at least those at the SBA, are already held accountable by state laws and regulations governing ethics, conduct, and conflicts of interest. Requiring these board members to register as "municipal advisors" would be unnecessarily burdensome and duplicative, and may diminish the quality of volunteer service available to municipalities and/or discourage service altogether.

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<sup>1</sup> For instance, to the extent that members of a public board are fiduciaries of, and represent, the funds they manage, it is not logical that in debating investment strategies or policy they are at the same time considered both the providers and the recipients of advice to/from each other.

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**Definition of "Municipal Advisor," Generally**

Section 15B(e)(4)(A) of the Exchange Act, as modified by Dodd-Frank, 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. 15 U.S.C. 78o-4(e)(4)(A)

[emphasis added].

In the preamble to its proposed regulations, the SEC attempts to clarify that the "employee" exception should include certain unpaid positions:

The Commission believes that the exclusion from the definition of a "municipal advisor" for "employees of a municipal entity" should include any person serving as an elected member of the governing body of the municipal entity to the extent that person is acting within the scope of his or her role as an elected member of the governing body of the municipal entity. "Employees of a municipal entity" should also include appointed members of a governing body to the extent such appointed members are *ex officio* members of the governing body by virtue of holding an elective office. 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." The Commission believes that this interpretation is appropriate because employees and elected members are accountable to the municipal entity for their actions. In addition, the Commission is concerned that appointed members, unlike elected officials and elected *ex officio* members, are not directly accountable for their performance to the citizens of the municipal entity. 76 Fed. Reg. 834.

We note some confusion as to how this language should apply to a public retirement system in particular, perhaps stemming in part from apparent confusion as to whether a public retirement system is a "municipal entity," a "municipal financial product," or both simultaneously. *I.e.*, the SEC in a circular fashion appears to consider a public retirement system to be "plan, program, or pool of assets" that somehow constitutes both the "municipal entity" issuer of a municipal financial product as well as the "municipal financial product" being issued. *Compare* discussions at 76 Fed. Reg. 829 and 830.

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In fact, a public retirement system has several constituents and may involve multiple "municipal entities" including (i) the plan sponsor, *i.e.*, the municipal entity that creates the plan and establishes its terms, (ii) one or more contributing employer municipalities (including but not limited to the plan sponsor), (iii) a trust "entity" or trust relationship established under state law, and (iv) a governing board that has a fiduciary role and obligation in the oversight and operation of the plan, which may (or may not) be a separate and distinct government agency and which may (or may not) also serve as the trustee of the trust. The "plan" comprises all of these components and more, *i.e.*, it is a framework, not necessarily an "entity" as such. Thus, particularly in the case of a public retirement system – but also in the context of other state-wide funds that operate in a similar manner - it makes little sense to distinguish employees or elected officials of one constituent member from another (*e.g.*, a person elected to state-wide office as opposed to one specifically elected or appointed to the board of a state-sponsored retirement system, or an employee of a contributing municipality who is not also a staff employee of the system itself).

In addition, we believe that the Commission is misinformed as to the accountability of appointed board members, at least as to the SBA.

#### **Application of the Employee Exception to Florida**

The SBA is a constitutional body comprised of the Governor, the Chief Financial Officer, and the Attorney General. See the Florida Constitution of 1885, art. IX, §16, which was incorporated by reference into the Florida Constitution of 1968 Article XII, §9(c)(2). The SBA is investment fiduciary for the assets of the Florida Retirement System (Defined Benefit Plan) and as well as certain non-retirement state-wide and local municipal investment funds and acts as administrator for the Florida Retirement System (Defined Contribution Plan).

As these three officials are elected to statewide office by the Florida voters, we believe that the SBA may be unique, or nearly so, in that election to the office by definition includes election to the SBA itself (in addition, these officials are also employees of the State).<sup>2</sup> Accordingly, regardless of how one interprets the "employee" exception from the definition of "municipal advisor," we believe that the members of the SBA should fall squarely within the employee exception.<sup>3</sup>

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<sup>2</sup> The SBA also employs a staff to assist in performing its investment functions, and their salaries are paid from an administrative trust fund that changes the various individual investment funds that the SBA manages. As such, we assume that these employees would be considered as expressly covered by the "employee" exemption. Nonetheless, we note that there remains some ambiguity as to whether an individual on the payroll of one state or local entity would be considered as an "employee" when performing services in connection with another state or local entity. In our view, it should suffice that the individual ultimately is a public employee.

<sup>3</sup> Nonetheless, the language at 76 Fed. Reg. 834 is so vague and ambiguous as to call even this conclusion into doubt.

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Notwithstanding the foregoing, two additional advisory bodies within the SBA organization assist the board in the investment and management of certain state and local funds.<sup>4</sup> The Investment Advisory Council ("IAC") is a nine-member body which reviews SBA investments and makes recommendation to the SBA regarding investment policy, strategy, and procedures with respect to all Florida funds managed by the SBA. Each of the IAC members is appointed to the IAC by the SBA. Members of the IAC possess special knowledge, experience, and familiarity with financial investments and portfolio management, *i.e.*, in many cases they are appointed precisely because of their investment expertise. Recommendations of the IAC are non-binding upon the SBA.

The Participant Local Government Advisory Council ("PLGAC") is a six-member body created to advise the SBA with respect to the administration and management of two local government surplus funds, the Local Government Surplus Funds Trust Fund and Fund B Surplus Funds Trust Fund. The SBA also appoints the individual members of the PLGAC, each of whom possesses experience within local and municipal government and/or the dealings of the trust funds. Recommendations of the PLGAC are non-binding upon the SBA.

Some of the members of the IAC and the PLGAC may be current or former state or local elected officials or employees. However, some members are private individuals who have relevant expertise and who serve as unpaid volunteers. These members could potentially fall under the proposed definition of "municipal advisors" under the Commission's interpretation. The Commission asserts that this interpretation is appropriate because appointed, *non-ex officio* board members are not directly accountable for their performance to the citizens of the municipal entity.

We respectfully and forcefully disagree with the Commission's assumption that appointed municipal board members are not accountable to the public for their actions. For the SBA, this is simply not the case. Both the IAC and the PLGAC, in addition to all Florida public officials (whether elected, employed, or volunteers), are subject to a strict set of statutory ethics regulations.<sup>5</sup> As applied specifically to the boards of the IAC and PLGAC, the laws prohibit board members from misusing their position by:

- soliciting or accepting gifts or unauthorized compensation,
- disclosing non-public information acquired by reason of the position,
- carrying on any separate business or investment relationship with the SBA, or

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<sup>4</sup> A third body, the Audit Committee, is also appointed; however, we do not believe that their functions could be interpreted to include providing "advice" within the meaning of section 975.

<sup>5</sup> See "Code of Ethics for Public Officers and Employees," Florida Statutes §112.

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- holding any employment or contractual relationship which poses a conflict with the duties of the position.<sup>6</sup>

The Florida "Sunshine Law"<sup>7</sup> also adds oversight to the activities of the IAC and PLGAC. The Sunshine Law requires public access to all board meetings and to official meeting minutes. The Sunshine Law also prohibits board members from discussing with one another any information or issues in any forum outside of an actual board meeting itself. Penalties for violations of the Sunshine Law and the Code of Ethics include (but are not limited to) impeachment, removal from office, suspension, public censure, a civil penalty up to \$10,000, and restitution of any pecuniary benefits derived.

Accordingly, we contend that appointed members of the IAC and PLGAC who are not also employees or elected officials (or otherwise exempt from registration under other provisions of the law) are directly accountable for their performance to the beneficiaries of the funds managed by the SBA under a rigorous enforcement scheme, such that the Commission's rationale for requiring them to register as municipal advisors does not apply. Thus, we urge the Commission to extend the definition of "employee" to include any appointed individual who is subject to the same or similar ethics and conflict of interest rules as are applied to municipal employees and/or elected officials.

Thank you for this opportunity to comment.

Sincerely,



Richard K. Matta

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<sup>6</sup> See also Florida Statutes §215.444(3) (requiring IAC board members to submit an annual conflict disclosure statement).

<sup>7</sup> See Florida Statutes §286.011; see also Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974) (finding that even advisory boards whose powers are limited to making non-binding recommendations to a public agency are subject to the state Sunshine Law).