WASHINGTON
HEALTH CARE FACILITIES
AUTHORITY
Financing the Health Care Future

#7414

February 15, 2011

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

Re: File Number S7-45-10

Dear Ms. Murphy:

The Washington Health Care Facilities Authority (the "Authority") writes to submit this comment on Rule 15Ba1-1 (the "Proposed Rule") under the Securities Exchange Act of 1934, as amended (the "Exchange Act), proposed by the Securities and Exchange Commission (the "Commission") pursuant to its Release No. 34-63576 (the "Release").

The Authority is an agency of the state of Washington (the "State") established to provide federally tax-exempt nonrecourse revenue bond financing for governmental and nonprofit health care facilities within our state. The Authority consists of five members. Four members serve *ex officio*: the Governor, the Lieutenant Governor and the Insurance Commissioner of the State, all of whom is elected to their positions, and the State Secretary of Health, who is appointed by and serves at the pleasure of the Governor. The fifth member of the Authority is a member of the public, also appointed by the Governor, subject to confirmation by the State Senate, on the basis of the member's interest or expertise in health care delivery.[1]

As noted in the Release, the Commission intends the Proposed Rule to give effect to amendments to the Exchange Act resulting from provisions of the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") requiring registration of municipal advisors with the Commission. The Dodd-Frank Act specifically excludes municipal entities (statutorily defined to include state agencies like the Authority) and their employees from the definition of regulated municipal advisors. As described in the Release, the Commission proposes interpretations of these terms that would exempt only actual municipal employees, as well as those members of the governing body of a municipal entity who are either directly elected to that position or who are serving in that capacity *ex officio* by virtue of holding another elective office, but not municipal governing body members who are appointed to their positions, making them subject to Commission regulation. For the reasons set forth below, we believe this approach to be inappropriate and overreaching.

[1] Revised Code of Washington ("RCW") 70.37.030.

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1. Appointed governing body members are accountable. In the Release, the Commission articulates its belief that appointed members of a governing body of a municipal entity are specifically not to be excluded from the definition of a municipal advisor, reasoning that employees and elected members are accountable to the municipal entity for their actions, but appointed members are not.[2] That conclusion is incorrect. As a general matter, appointed members of municipal entity governing bodies are accountable by virtue of their appointment by directly elected officials. In the case of the Authority, its two appointed members—the Secretary of Health and the Authority's public member—are both appointed by the Governor of the State, and the public member is also confirmed by the State Senate. The Secretary of Health serves at the pleasure of the Governor. Both appointed members, like the *ex officio* members, are bound by fiduciary duties to the public,[3] and all of the Authority's members and employees are subject to State statutes prohibiting misconduct in public office[4] and promoting ethics in public service.[5] To insure accountability, State law requires that all of the Authority's decision-making occur in open public meetings[6] and all of its records be available to the public.[7] There is no meaningful distinction to be drawn between the level of accountability of the Authority's appointed members, on the one hand, and employees and its elected members on the other.

2. The municipal entity and its governing body are often identical. As a general matter, it is common for a municipal entity and its governing body to have the same identity. For example, State law specifically provides that the Authority "consists of" its five members[8] Thus, the Authority and its governing body are one and the same entity. In this context, it is inconsistent with the Dodd-Frank Act's express statutory exemption to subject *any* members of the governing body of a municipal entity to SEC regulation of municipal advisors.

3. Municipal governing body members are not their own advisors. As defined in the Dodd-Frank Act, municipal advisors provide advice to or on behalf of municipal entities. For example, the Authority regularly engages the services of outside financial advisors to provide it with professional advice with respect to the issuance of the Authority's bonds and municipal financial products, and believes that the municipal advisory provisions of the Dodd-Frank Act will apply to those outside consultants. However, since the Authority is the intended beneficiary of municipal advisor activities that the Commission is to regulate, it is illogical to treat the advised as if it were the advisor. This is particularly true where the municipal entity and its governing body are the same entity, such as the Authority.

4. Governance communications is not advice. The role of the members of the governing body of a municipal entity is to exercise their judgment in guiding the entity towards the accomplishment of its policy objectives under State law. In the case of the Authority, that

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[2] Release, Section II.A.1.c.
[3] *Northport v. Northport Townsite Co.*, 27 Wash. 543 (1902).
[4] Chapter 42.20 RCW.
[5] Chapter 42.52 RCW.
[6] Chapter 42.30 RCW.
[7] Chapter 42.56 RCW.
[8] RCW 70.37.030.

objective is to "minimize the capital costs of construction, financing and use [of such facilities] and thereby the costs to the public of the use of such facilities and to contribute to improving the quality of health care available to our citizens,"[9] which the Authority works to accomplish by enabling health care providers to access tax-exempt financing in the municipal capital markets. An important aspect of that work involves communication by and among the members of the Authority in furtherance of their responsibilities to the agency. Such communications by public agency governing body members in the course of carrying out their duties as such should not be considered advice justifying Commission regulation under federal law.

The reason that we are so concerned about the Commission's proposal is that it would result in a significant administrative burden on the appointed members of the governing bodies of municipal entities. The Commission's proposal to subject appointed governing body members to regulation as municipal advisors, and the resulting need to complete the lengthy and burdensome proposed Form MA-I and pay any associated fees will most certainly work to dissuade qualified future candidates from volunteering to take on this important work.

We respectfully request that the Commission acknowledge that appointed members of the governing bodies of municipal entities, such as those who sit on the Authority, are equally accountable for their actions and should be exempted, together with the employees and directly elected or elected *ex officio* governing body members, from any regulation as "municipal advisors" under the Proposed Rule. Thank you for your consideration.

Respectfully submitted,

WASHINGTON HEALTH CARE FACILITIES AUTHORITY

By Donna A. Fincke

Donna A. Fincke
Executive Director

[9] RCW 70.37.010.