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Metropolitan Transportation Authority
State of New York

February 18, 2011
Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.,
Washington, DC 20549-1090

Re: File Number S7-45-10
SEC proposal to require appointed board members to register as "municipal advisors"
Release 34-63576 (the "Release")

Ladies and Gentlemen:

The Metropolitan Transportation Authority (the "MTA") respectfully submits the following comments in response to proposed Rules 15Ba1-1 through 7 (the "Proposed Rule") of the Securities and Exchange Commission (the "SEC"), which are intended to implement Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act").

As discussed below, the MTA supports the regulation of third party professional independent municipal advisors who are engaged in the business of providing advice relating to issuance of municipal securities and other financial products, but believes the Proposed Rule should be clarified to ensure that MTA's own non-compensated members -- as distinguished from third party professional independent municipal advisors engaged by the MTA to provide it with advice -- are not subject to SEC regulation as municipal advisors. Board members of the MTA are a constituent part of the MTA. They should not be subjected to SEC regulation as municipal advisors by reason of performing their state law-defined governance and oversight duties as constituent members of the MTA. Such a regime of SEC regulation would wrongly subject the MTA's governing members to regulation as if they were instead its external advisors, and may discourage talented individuals from contributing their time to serve as members of the MTA or other state or local public authorities, to the significant detriment of such public institutions

By way of background, the MTA was created by New York State (the "State") in 1965, as a public benefit corporation, which means that it is a corporate entity separate and apart from the State, often referred to as a "public authority."

The MTA has responsibility for developing and implementing a single, integrated mass transportation policy for MTA's service region, which consists of New York City and

seven New York metropolitan area counties. It carries out these responsibilities by operating the transit and commuter systems through its subsidiary and affiliate entities including New York City Transit Authority and its subsidiary, Manhattan and Bronx Surface Transit Operating Authority; Staten Island Rapid Transit Operating Authority; The Long Island Rail Road Company; Metro-North Commuter Railroad Company; Metropolitan Suburban Bus Authority; MTA Bus Company; MTA Capital Construction Company, and Triborough Bridge and Tunnel Authority.

MTA, by statute, is governed by a board consisting of a Chairman and 16 other voting members, two non-voting members and four alternate non-voting members, all of whom are appointed by the Governor, with advice and consent of the State Senate. Pursuant to statute, Board members other than the Chairman, who is also the MTA chief executive officer, serve without compensation. All voting members cast one vote each (with the Chairman having an additional tie-breaking vote), except for the voting members required to be residents of the counties of Dutchess, Orange, Putnam and Rockland, who collectively cast one vote. The board members of the MTA also serve as board members of MTA's affiliates and subsidiaries.

Amongst MTA's general powers is the power to issue notes, bonds and other obligations. MTA does so in connection with the development of the New York Metropolitan area's mass transportation systems. As noted, MTA engages third party professional independent municipal advisors in the business of providing advice relating to issuance of municipal securities and other financial products. Such professional independent municipal advisors are selected through a public request for proposal process and approved by the MTA members.

The MTA and its members may rely upon the advice of such professional independent municipal advisors when issuing debt and entering into swaps and other financial products. MTA supports the regulation of such third party professional independent municipal advisors who are engaged in the business of providing advice relating to issuance of municipal securities and other financial products. However, the MTA is concerned that certain SEC interpretations of the scope of the Act as described in the Release introduce the possibility that its own members may also become subject to SEC regulation. This may discourage talented individuals from serving as members of the MTA and, even if they agree to serve, could interfere with their ability and willingness to freely offer their best input in their capacity as board members relating to the debt issuance programs of MTA and its subsidiaries or other affiliates and to the consideration of employing interest rate swaps, fuel hedges and other derivatives as part of MTA's overall financial management of its transportation program - lest such participation result in their classification as a municipal adviser under the Proposed Rule.

The Release appears to assume that a governing body may be distinguishable in a meaningful way from the municipal entity itself. In the case of the MTA, however, that is not so. MTA's organic legislation states that the MTA—the "authority"—"consists" of

its chairman and its members: these individuals are not an independent group apart from MTA, they *are* the MTA, indistinguishable from the MTA itself.[1]

It is difficult to conceive how these members, who carry out statutory duties as governing members of the authority, could be viewed as acting as external "municipal advisors" to the MTA. Far from serving as external "advisors," MTA members are engaged, by statute, in MTA governance. Their statutory governance role, and the duties that arise directly from that role, plainly distinguish them from those who provide independent professional third party advice to the MTA—including from professional independent municipal advisors. Such advice from external professional municipal advisors, indeed, is designed to assist the governing members in performing their statutory role as members of the public authority.

The appointment of these members is required to comply with certain geographical requirements to assure that all parts of the area of New York State served by MTA are represented among the members of the authority, and the appointment process requires involvement by the Governor, the State Senate, county executives and the Mayor of New York City.[2] In addition, the statutory provisions require that the members have experience in one or more areas deemed central to the "mission" of the MTA.

In order for the Chairman and the members to carry out their statutory duties to implement MTA's accomplishment of its statutory mission, it is necessary for members to engage in deliberation and decision-making with respect to financial matters, including issuance of debt. When members discuss a matter related to MTA debt securities or swaps or other financial products, in order to fulfill their statutory mandate as the governing body, the members must be free to express their views on such matters without concern that their participation in their capacity as members in such discussions could later be deemed to be formal "advice" triggering liability for failure to register under the Proposed Rule.

The language in the Release suggests it is appropriate to impose a different standard on board members engaged in such discussions if they are appointed rather than elected members of the public body, regarding the former on the same footing as independent professional municipal advisors, while treating elected members of a public authority board as outside the scope of registration. The MTA does not believe that the distinction in the Release between elected and appointed members is consistent with the intent of the Act nor does it take into account that the appointed members of MTA are governed by strict statutory requirements, passed by elected officials, regarding members' qualifications for service, fiduciary duty and removal for various causes as described above.

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[1] See New York Public Authorities Law, section 1263(1)(a) ("The authority shall consist of a chairman, sixteen other voting members, and two non-voting and four alternate non-voting members . . . appointed by the governor by and with the advice and consent of the senate.")

[2]The Mayor of New York City recommends to the Governor four voting members. The chief executive officer of each the seven New York metropolitan area counties recommends to the Governor a voting member who must reside in that county. Public Authorities Law, section 1263(1)(a).

The members are subject to the same fiduciary duties as would be elected board members and are subject to removal by the Governor for "inefficiency, neglect of duty, breach of fiduciary duty or misconduct in office." And, while MTA members are not elected to their positions, they are subject by virtue of being members, to New York State's Public Officers Law, which along with the Public Authorities Accountability Act of 2005 and the Public Authorities Reform Act of 2009, require strict adherence to legislatively mandated ethics laws, conflicts provisions and disclosure provisions among others, and oversight by the legislatively created Authorities Budget Office, which among other things can formally investigate authorities (using subpoenas), publicly warn and censure authorities, and recommend the suspension or dismissal of members of authorities.

As noted, members of the MTA may be removed by the Governor for a breach of fiduciary duty. Recently, in the Public Authorities Reform Act of 2009, the Legislature set forth in detail what that fiduciary duty entails, and also required members of the MTA and all other New York State authorities to sign a formal acknowledgement (on a form developed by the Attorney General and an authorities oversight office), that they "understand" their role and their "fiduciary responsibilities" and also that they acknowledge their duty of loyalty and care to their authority and a "commitment to [its] mission and the public interest." In addition, MTA members, and all other members of New York State authorities, must participate in state-approved training regarding their "legal, fiduciary, financial and ethical responsibilities."

MTA for these reasons disagrees with the belief expressed in the Release that only directly elected members are sufficiently accountable to municipal entities and citizens of the municipal entity for State oversight to be effective. To subject non-elected MTA members to registration requirements and expense, federal fiduciary standards and federal securities law liability when appropriate state law exists governing the conduct of members is wholly unnecessary. Moreover, such an expansive construction of "municipal advisor" may have the unintended and unwelcome consequence of discouraging membership in MTA and full and effective participation in implementing MTA's statutory mission.

The MTA requests that the Commission make clear that individuals serving in a governance role similar to MTA's members, whether appointed or elected, are exempt from registration as a municipal advisor.

Thank you for this opportunity to comment on the Proposed Rule.

Sincerely,

James Henly
General Counsel