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Via electronic mail to: rule-comments@sec.gov

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE Washington, D.C. 20549-0690

Re: ***File No. S7-45-10*** *(Securities and Exchange Commission Release No. 34-63576, Registration of Municipal Advisors)*

Dear Ms. Murphy:

This letter contains comments submitted to the Securities and Exchange Commission (the "Commission") by the Wayne County Airport Authority (the "Authority") in relation to SEC Release No. 34-63576, dated December 20, 2010 (the "Release"). The Release requests comments on the Commission's proposed Rules 15Ba1-1 through 15Ba1-7, to be established pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), which contains requirements for the registration of municipal advisors with the Commission.

The Authority appreciates the opportunity to respond to the Commission's request for comments. It notes at the outset that its comments relate to proposed Rule 15Ba1-1 (the "Proposed Rule"). The Authority's concern and comments relate specifically to the Commission's proposal, described in the Release, to exclude from the definition of a "municipal advisor" elected members of a governing body of a municipal entity, but to include appointed members of a municipal entity's governing body, unless such appointed members serve as ex officio members of the governing body by virtue of holding elective office. As a result of this application of the Proposed Rule, appointed members of a municipal entity's governing body (other than elected officials serving ex officio) would be subject to the registration requirements of the Act. In its request for comments, the Commission asks commenters to address whether these distinctions are appropriate. As discussed in this letter, the Authority takes the position that these distinctions are not appropriate and requests that the Commission exclude all municipal governing body members—elected or appointed—from the definition of "municipal advisor."

Authority Background and Governance

The Michigan legislature established the Authority by enactment of the Public Airport Authority Act, Act 90, Michigan Public Acts of 2002 ("Act 90").[1] The Authority's purpose is to control and manage Detroit Metropolitan Wayne County Airport ("Detroit Metro") and Willow Run Airport. As of calendar year 2009, Detroit Metro was the nation's 11th busiest airport, measured by total aircraft operations. Nearby Willow Run Airport primarily serves cargo and corporate aircraft operations.

The Authority is governed by a seven-member board. All board members are appointed by elected officials or elected bodies: four are appointed by the Wayne County Executive (the elected chief executive officer of Wayne County, Michigan), two are appointed by the Governor of the State of Michigan and one is appointed by the Wayne County Commission (the elected legislative body of Wayne County). The Authority board addresses a broad range of financial, operational, human resource and policy issues, and Act 90 does not require that board members possess special expertise in any one area—finance or otherwise. Thus, the makeup of the Authority board reflects the interests and priorities of the appointing parties, and board members' backgrounds vary. At any time, the Authority board may consist of business leaders, policy consultants, lawyers representing a variety of practice areas, labor leaders and community activists.[2]

Factors to Be Considered in Connection with the Registration of Governing Body Appointees

Activities of Governing Body Members

A "Municipal advisor" either "undertakes a solicitation of a municipal entity" or provides "advice to or on behalf of the municipal entity . . . 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; . . ."[3] Solicitation of a municipal entity is not an issue or a concern with respect to governing body appointees. Most governmental entities, including the Authority, have in place ethics policies (typically codified by ordinance or an equivalent form of local law) that prohibit board members from soliciting their own boards for financial advisory services or products,[4] and most states have conflict of interest statutes that similarly prevent

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[1] MCL 259.108-.125c.

[2] For current Authority board member biographies, see http://www.metroairport.com/about/members.asp.

[3] 15 USC 78o-4(e)(4)(A).

[4] See, e.g., Wayne County Airport Authority Ethics Ordinance (adopted September 15, 2002, as last amended March 25, 2010).

board members from soliciting the governmental entities they serve.[5] Moreover, even if a board member was authorized under state and local law to solicit his or her own board, such a board member would very likely be a financial professional already subject to the municipal advisor registration requirement—based on his or her status as a financial professional, not as a board member. Thus, for purposes of the discussion regarding the registration of governing body appointees as municipal advisors as described in the Release, we assume that in order for such an individual to be subject to registration as a municipal advisor, he or she must provide "advice" to a municipal entity on the subject of municipal securities or investments.

The "advice" requirement represents the fundamental problem with the Proposed Rule as interpreted and described in the Release: *Governing body members are consumers of advice, not providers.* Decisions of governing body members, whether appointed or elected, are expressions of legislative will, and are not advisory in nature. Legal authority on this issue will be a matter of state law.[6] Michigan courts, for example, are consistent in expressing the principle that municipal entities act at the legal direction of the governing body.[7] That legal direction will be determined by the votes of the members, each acting individually. The will of the majority of the members will prevail, and the will of the minority will fail. This construct defies the definition of "advice," a term that is not defined in the Proposed Rule or the Act, but is universally recognized to mean "words given or offered as an opinion or recommendation about future action or behavior."[8] An action taken in response to a decision of a governing body—elected or appointed—is an action taken upon *direction* not *recommendation*. Thus, the inclusion of any governing board members in the definition of a "municipal advisor" fails the threshold "advice" requirement of the Act's registration provisions.

Accountability

The Commission's discussion in the Release suggests that accountability is a concern underlying its belief that appointed governing body members should not be excluded from the "municipal advisor" definition. The Commission's discussion does not explain why paid employees, who are expressly exempt from registration, face a level of accountability that is materially different from that of a volunteer board appointee. Indeed, an unscrupulous or underperforming employee may lose his or her job; and an unscrupulous or underperforming

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[5] In Michigan, see section 2 of Act 317, Michigan Public Acts of 1968, as amended. MCL 15.322. For a discussion of other states' conflict of interest laws, see Eugene McQuillin, *The Law of Municipal Corporations*, §§ 12.138, 29.98 (3rd Ed.).

[6] For a survey of state court decisions on this topic, see McQuillin, *supra* at §§ 13.01-03 (3rd Ed.).

[7] See, e.g., *Ture v Council of City of Ecorse*, 331 Mich 380 (1951).

[8] *Oxford American Dictionary and Thesaurus*, 2003.

governing body appointee faces a similar outcome: removal from office by the source of the appointment.

Any appointee is, by definition, appointed by some individual or group. A governing body appointment is typically the responsibility (usually set forth by statute) of an elected official or body that has some direct policy interest in, or shared jurisdiction with, the entity to which the appointee is appointed, as described in the previous discussion of the Authority's background and governance structure. That appointment power is commonly accompanied by the power of removal for cause. This is the case for members of the Authority board and most other appointed governmental boards under Michigan law.[9] The Commission also expresses concern that, unlike elected officials, appointees are not directly accountable to the electorate. This ignores a fundamental principle of our representative democracy, whereby elected officials are accountable to the voters for the performance and integrity of their appointees.

Practical Problems

The Proposed Rule, as currently interpreted by the Commission in the Release, would have a chilling effect on citizen participation in government. The registration regime, if applied to governing body appointees, could severely limit the pool of talented and engaged individuals willing to serve. The Proposed Rule also has implications beyond the registration requirement. The Act directs the Municipal Securities Rulemaking Board (the "MSRB") to "propose and adopt rules to effect the purposes of [the Securities Exchange Act of 1934, as amended by the Act] with respect to . . . advice provided to or on behalf of municipal entities or obligated persons by . . . municipal advisors . . . ."[10] Although the MSRB has not yet issued any new qualification-related rules for municipal advisors, it clearly intends to do so and is actively "solicit[ing] input from market participants regarding appropriate professional qualifications for municipal advisors."[11] MSRB qualification standards typically involve extensive testing on topics such as municipal securities rules, financial regulations, tax issues and general finance and economic concepts. State authorities, local economic development corporations, downtown development authorities and other entities with finance power, including the Authority, are populated by a diverse group of individuals, ranging from active professionals to concerned retirees. The prospect of Commission regulation and MSRB testing and qualification requirements coming to bear on these individuals would serve as a deterrent for many, especially for potential appointees to a board such as the Authority board

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[9] See, e.g., 63C Am Jur 2d, Public Officers and Employees § 170. For a sample of removal powers under Michigan law, see MCL 125.112(3) (public airport authorities), 125.1804(5) (tax increment authorities), 259.111(6) (downtown development authorities).

[10] 15 USC 78o-4(b)(2)(A).

[11] http://www.msrb.org/Rules-and-Interpretations/Professional-Qualification.aspx.

whose members are not compensated for their service or even for attendance at board meetings.[12]

Moreover, the economic analysis contained in the Release seems to ignore the effects of including governing body appointees within the registration regime. Presumably governing body appointees would be required to apply for registration using Form MA-1, which is intended for "natural persons" who serve as "municipal advisors." The Commission estimates that 21,800 individuals would be subject to Form MA-1 registration. That number is the sum of individual investment advisors and/or broker-dealers (16,800), individuals employed at financial advisor firms (4,500) and individuals employed at solicitation firms (500).[13] These numbers are derived from data relating to finance professionals, most of who are already subject to some sort of regulation. The estimated amounts of money and time needed to establish broad compliance with the Proposed Rule completely disregards governing body appointees, who may number in the tens of thousands and will likely require significantly more time and expense per person to ensure compliance than the population of financial professionals assumed in the Proposed Rule. The cumulative scope of such additional time and expense is almost impossible to calculate.

The Release overlooks other practical challenges that would seem to outweigh the benefit of including governing body appointees: For example, when would an appointed governing body member become a "municipal advisor"? It would seem that such an individual would not be a "municipal advisor" immediately upon appointment, but rather would become a "municipal advisor" only once a matter relating to municipal financial products or municipal securities comes before the governing body, assuming *arguendo* that an appointed member's comments or vote on such a matter represents "advice" in the first instance (a notion which, as discussed previously, the Authority strongly disputes). Many entities carry on for years before being faced with a transaction involving municipal investments or municipal securities. A sudden springing of the registration requirement could lead to a variety of irregularities in registration and could disrupt the timing of governing body action on bond issues and other matters. The timing of governing body proceedings in connection with a bond issue can be quite sensitive, especially for entities such as the Authority who meet relatively infrequently. If board action is delayed due to the need for board members to complete the registration process, important finance milestones may be thrown off course.

Moreover, subjecting governing body appointees to registration may create uncertainty about the liability exposure such appointees face in the course

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[12] See MCL 125.113(4).

[13] Release at § IV.C.

of their board duties. Governing body appointees are generally indemnified and held harmless for actions taken within the scope of their duties in office. Such indemnification is typically backed by public officials' liability insurance of some kind. Public officials' liability insurance policies generally do not contemplate the notion that the covered individuals are subject to a federal regulatory regime simply by participating in legislative activity relating to municipal investments or municipal securities, which, as far as we can determine, is unprecedented. Subjecting governing body appointees to the Act's registration regime could cause a disruption in the procurement and pricing of insurance on municipal appointees. Insurers will need to decide to what extent their policies cover any liability exposure related to the Act's registration regime, and if existing policies do not cover such exposure, the insurers will need to determine how to price that coverage. This could lead to an unnecessary increase in the costs of insurance for municipal entities.

Conclusion

Subjecting municipal governing body appointees to the registration regime under the Act would do little to fulfill the policy objectives of the Act and the Proposed Rule, while discouraging participation in government and imposing uncertainty and confusion upon public bodies. Therefore, the Authority requests and recommends that all members of municipal governing bodies, elected or appointed, be expressly exempted from the Act's registration requirement.

Thank you once again for the opportunity to provide our comments. The Authority looks forward to continued public dialogue with the Commission in connection with the Proposed Rule.

Sincerely,

Emily K. Neuberger

Emily K. Neuberger
Senior Vice President and General Counsel