

February 16, 2011

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

***Re: File Number S7-45-10***

Dear Secretary Murphy:

On behalf of the American Hospital Association's (AHA) more than 5,000 member hospitals, health systems and other health care organizations, and our nearly 40,000 individual members, thank you for this opportunity to comment on proposed new rules 15Ba1-1 through 15Ba1-7, which would establish a permanent registration regime within the Securities and Exchange Commission (SEC) for municipal advisors.

A majority of the AHA's member hospitals are tax-exempt and routinely turn to the municipal bond market to raise needed capital. Under the SEC's proposal, hospitals that use municipal bond financing and are committed to support the payment of all or any part of a bond issue would be considered "obligated persons," subject to the various applicable requirements of the rule.

The AHA supports the application of these rules to third-party, professional financial advisors to hospitals and bond issuing authorities. **However, the AHA believes that the individuals who serve on hospital governing boards, hospital employees who seek bond financing from state or local authorities, and all individuals who serve on the boards of bond issuing authorities should be excluded from the definition of "municipal advisor" under the proposed rule.**

## **HOSPITAL TRUSTEES AND EMPLOYEES**

First, of particular concern to hospitals, is the proposal that appointed board members of a municipal entity be considered "municipal advisors" and subject to registration requirements. The proposal states:



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.

The AHA estimates 60,000 trustees currently serve on tax-exempt hospital governing boards. Some hospitals are organized as “municipal entities,” and almost all hospitals and health systems are obligated persons, as described in the proposed rule; their boards may be appointed or elected. To address the concerns of these trustees about their status under the proposed rule, the AHA urges the SEC to clarify that members of obligated hospital boards are exempt from the registration requirement or that a clear exclusion be applied to such directors.

As a practical matter, whether elected or appointed, these trustees have the same obligations and responsibilities. They are bound by fiduciary duties to conduct their activities in good faith, with reasonable care, and in the best interests of the hospital and community they serve. Each trustee who fails in these basic, critical duties can be subject to legal action. Furthermore, as trustees of tax-exempt entities, hospital board members are subject to Internal Revenue Service (IRS) rules and oversight. The IRS has issued guidance for governing boards to help ensure that trustees understand their roles and responsibilities and actively promote good governance practices. Relevant to this SEC-proposed rule, the IRS guidance addresses requirements related to due diligence, conflict of interest, transparency, financial audits and document retention. (See IRS Form 990, *Return of Organization Exempt from Income Tax*, and related materials – [http://www.irs.gov/pub/irs-tege/governance\\_practices.pdf](http://www.irs.gov/pub/irs-tege/governance_practices.pdf).)

The IRS, as well as state and local government oversight of governing boards, provides a rationale for exemption of trustees similar to other exemptions the SEC has proposed. The proposed rule states that “certain persons who are currently regulated (such as broker-dealers serving as underwriters or investment advisers providing advice which would subject them to the Investment Advisers Act) or that are governed by other professional codes of conduct (such as attorneys providing traditional legal services) would not be required to register as municipal advisors.” Every hospital trustee is subject to state corporate law obligations and duties of directors.

For the SEC to propose exempting elected, but not appointed, board members from the definition of “municipal advisor” is to make a distinction where there is no substantive difference in their respective legal obligations.

Second, the rule defines the term “municipal advisor” to mean a person who provides advice to or on behalf of a municipal entity or obligated person. To consider board members “municipal advisors” is to misunderstand their role in the governance of their institutions. Board members make financial decisions based on the advice of outside capital financing professionals who themselves would be subject to the proposed registration requirements, and properly so. The

vast majority of hospital trustees are members of the community where the hospital is located. They come from all walks of life but are generally community leaders, accomplished in their respective fields, and serve without monetary compensation.

It is unclear what additional benefit would flow to the community by requiring board members to fulfill a costly, burdensome, periodic and voluminous registration requirement with the SEC. This requirement, and the civil and criminal penalties attached for failure to comply, would act as a powerful deterrent to voluntary service and could result in the loss of many talented and dedicated community leaders.

With respect to hospital employees, the final rule should clarify that they, too, are included in the exemption from the definition of “municipal advisor” and, therefore, exempt from the registration requirement. Hospital chief executive officers, chief financial officers and other managers are primarily involved in the day-to-day operations of their institutions. While they may periodically undertake municipal bond financings, that activity is on behalf of their employer, subject to board oversight, and parallels that of municipal employees who undertake bond financings. Municipal employees are exempt from the definition in their role as employees, as the proposed rule notes. Hospital employees are no less accountable than municipal employees and, indeed, are further subject to local and state corporate laws and IRS oversight.

For these reasons, the AHA urges the SEC to exclude from the definition of “municipal advisor” all governing board members and employees of obligated hospitals.

## **HOSPITAL EMPLOYEE AND TRUSTEE RELATIONSHIPS WITH ISSUING AUTHORITY BOARDS**

The broad applicability of the proposed rule unnecessarily implicates hospital employees or trustees in two other ways: first, the situation when hospital employees or retirees serve as appointed members of state and local bond issuing authorities; and second, when hospital employees seek bond issuances from bond issuing authorities.

The proposed rules should not apply in either of these situations; the regulations should instead be restricted to outside advisors whose livelihood is made through the provision of financial advice on matters of municipal bond issuance. Otherwise, the burdens and liabilities of these regulations will dissuade people who have expertise in health care from serving on local and state bond issuing authority boards to the detriment of good public service and the efficient operation of these authorities.

It also is unnecessary to implicate in regulations hospital employees, such as a chief financial officer, whose job includes securing capital, when they communicate to an authority or even their own employer. It is a hospital manager’s or trustee’s fiduciary duty to “advise” in the common sense meaning, and then decide on proper financial courses of action. To avoid any uncertainty about the application of the proposed registration requirement with respect to hospital employee interactions with bond issuing authorities, the rule should clearly state that

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hospital employees are included in the exemption from the definition of “municipal advisor” and, therefore, exempt from the registration requirement.

For these reasons, the AHA urges the SEC to exclude from the definition of “municipal advisor” directors of bond issuing authorities and employees of obligors who seek bond issuance.

The AHA supports the SEC’s goals of improving accountability and transparency in the financial system. The proposed rule moves in the right direction in its focus on the registration of municipal finance “market professionals.” However, to include hospital trustees and employees in the registration scheme adds no increased protections, but instead creates additional disincentives for voluntary community service. The broad scope of this proposal also seems to be out-of-step with President Obama’s call for improving regulations by minimizing burden and unnecessary regulation.

We would be happy to discuss further the implications of the SEC’s proposal for tax-exempt hospitals. Please contact Mike Rock, AHA senior associate director, at (202) 626-2325 if you have questions.

Sincerely,

Rick Pollack  
Executive Vice President