
Teacher Retirement System of Texas

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Elizabeth M. Murphy, Secretary
Securities and Exchange Commission ("SEC")
100 F Street, NE
Washington, DC 20549-1049

RE: Release No. 34-63576; File Number S7-45-10

On behalf of the Teacher Retirement System of Texas ("TRS"), we are writing to comment on the definition of "municipal advisor" under Section 15B of the Securities Exchange Act of 1934 (the "Exchange Act"). TRS provides retirement and related benefits for those employed by the public schools, colleges and universities of the State of Texas.¹ As authorized by the Texas Legislature and required by the Texas Constitution, TRS administers a defined benefit plan for its participants and retirees and maintains an approximately \$105 billion fund to support such plan. TRS neither issues municipal securities nor invests proceeds of such securities. TRS funding comes from state general revenue contributions, member contributions withheld from salary, and investment returns.

The question which the SEC seeks comment is whether appointed members of governing bodies of "municipal entities" are "municipal advisors" under proposed Rules 15Ba1-1 to 15Ba1-7 to the Exchange Act. To require appointed board members of "municipal entities" to register with the Securities and Exchange Commission (the "SEC") is (i) an inappropriate stretch of the SEC's rule-making authority and (ii) without public policy justification.

1. Registration Requirement Limited to Advisors of Municipal Entities Issuing (or Investing the Proceeds of) Municipal Securities

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") modified Section 15B of the Exchange Act to require that any municipal advisor to a municipal entity register with the SEC. Specifically, Section 15B(a)(1)(B) of the Exchange Act states,

It shall be unlawful for a municipal advisor to *provide advice to or on behalf of* a municipal entity or obligated person *with respect to municipal financial products or the issuance of municipal securities*, or to undertake a solicitation of a municipal entity or obligated person, unless the municipal advisor is registered in accordance with this subsection. (emphasis added)

¹ See Tex. Const., Art. 16, § 67

A “municipal advisor” is defined in Section 15B(e)(4)(A) of the Exchange Act to include,

a person (who is not a municipal entity or an employee of a municipal entity) that (i) 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) undertakes a solicitation of a municipal entity. (emphasis added)

If one follows definitions of “municipal financial products”, “municipal entity” and “municipal securities” and the embedded definition of “investment strategies”, each found in Section 15B(e) of the Exchange Act, the municipal advisor registration requirement seems confined to municipal entities issuing municipal securities and those investing the proceeds of municipal securities. TRS does not issue municipal securities or invest the proceeds of such securities. The SEC should modify the proposed rules to clarify that municipal entities who are not issuers of municipal securities or investors of proceeds of such securities are exempt from the registration requirements of Section 15B(a)(1)(B).

2. The Official Duties of TRS Board Members Do Not Constitute “Advice”

The Exchange Act further limits the definition of “municipal advisors” to those providing “advice to or on behalf of a municipal entity.”² In converting governing members of municipal entities to municipal advisors, the SEC confuses the primary role of these administrative bodies, and turns the concepts in the Dodd-Frank Act on their heads. Governing members receive advice from paid advisors, entity employees, legislators, and sometimes the public. These governing bodies, guided by their fiduciary obligations, must be able to rely on and use such advice to enact policies, provide oversight, and administer the entity without the chilling effects of potential federal liability.

Any deliberative process or act of governance should not be mis-construed as or deemed to be “advice to” a municipal entity requiring registration as a municipal advisor. Governing board members must be allowed to discuss matters in official meetings and with entity employees without the fear of triggering SEC registration and regulation. Prudent public pension governance requires robust analysis and free, wide-ranging discussion and the seeking of expert advice on any matters within their authority. The SEC should clarify that communication among, to, or by uncompensated or appointed public officials in accordance with one’s fiduciary duties, is not “advice to or on behalf of a municipal entity” under Section 15B of the Exchange Act.

3. TRS Board Members Qualify for the “Municipal Entity” Exclusion Provided in the Exchange Act

Congress carved out “municipal entities” from the definition of “municipal advisor.” Consistent with this exclusion, TRS requests that the proposed rules specifically exclude appointed governing board members from the definition of “municipal advisors.” A municipal entity, like a corporation, is not a real person. It functions only through its governing body, pursuant to policies adopted only after careful deliberation and consultation.

² See Section 15B(e)(4)(A) of the Exchange Act

The TRS Board of Trustees (the “TRS Board”) “is responsible for the general administration and operation” of TRS.³ The nine members of the TRS Board are the public face and governing body of TRS. A legal claim or suit against a TRS Board Member acting in their official capacity is a suit against TRS and the State of Texas.⁴ The TRS Board possesses “exclusive control” of all TRS assets and operation.⁵ These policy making, oversight and reporting duties are delineated in the Chapter 825 of the Texas Government Code.

The SEC should adhere to its congressional directive and clarify that all governing board members of a municipal entity are exempt from the definition of municipal advisor. A distinction between appointed and elected governing members fails to recognize that each governing member acts with fiduciary obligations on behalf of the municipal entity. Although TRS’s Board Members may possess different backgrounds and be nominated from different constituencies, each member’s fiduciary obligations to the financial health, prudent management, and administration of TRS are identical.

The costs of this proposed regulation will be borne by TRS plan participants as an unfunded mandate. TRS Board Members serve without pay but are reimbursed by TRS for expenses related to official board duties.⁶ TRS would bear the costs of each TRS Board Member who is required to register as a “municipal advisor” with the SEC solely due to performance of their prescribed fiduciary duties. Congress explicitly excluded municipal entities from the definition of “municipal advisor” to avoid burdening the very public entities it intended to protect. Consistent with this congressional intent, the SEC should clarify that all governing members of municipal entities acting in their official capacity are exempt from the definition of “municipal advisor.”

4. TRS Board Members are Appointed in Accordance with Texas Law

The composition, terms, qualifications, background and selection of the TRS Board is delineated in the Texas Government Code.⁷ The Texas Governor appoints, with the advice and consent (or confirmation) of the Texas Senate the nine members of the TRS Board. The Texas Senate’s consideration and confirmation of each TRS Board Member is open to the public, and any applicant’s file is a public record subject to the Texas Public Information Act.⁸

Each TRS Board Member serves a six-year, staggered term. Chapter 825 of the Texas Government Code requires that the TRS Board consist of uniquely qualified and diverse citizen volunteers. For example, (i) two board members must be public school district employees and nominated by their TRS participant peers; (ii) one board member must be a retired beneficiary of TRS and nominated by TRS retirees; (iii) one board member must be an institution of higher education employee and nominated by his or her TRS participant peers; (iv) three board members

³ See Tex. Gov’t Code § Section 825.101

⁴ See, e.g., *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (“[S]uits against state officials seeking to establish a contract’s validity, to enforce performance under a contract, or to impose contractual liabilities are suits against the State.”)

⁵ See Tex. Gov’t Code § Section 825.101

⁶ See Tex. Gov’t Code § 825.007

⁷ See Tex. Gov’t Code § 825.002-003

⁸ See generally Tex. Gov’t Code Ch. 552

must possess broad financial and investment experience, each being direct appointments of the governor; and (v) two Board members must possess broad financial and investment experience nominated by the State Board of Education (an elected body).⁹

This statutorily prescribed process for nominating TRS Board Members creates a qualified, accountable and responsible governing board. To discount the accountability of a board selected through this robust nomination and appointment process in favor of a directly elected board is not reasonable. It also confuses the notion of accountability in board governance. A governing board member should only be accountable to the entity it serves, acting for the exclusive benefit of the entity's members and beneficiaries. For plans like TRS, a general election does not assure this goal is met. The SEC should remove any distinction between elected and nominated governing members and exempt all governing board members of public pension plans, when serving in that capacity, from the definition of municipal advisor.

5. TRS Board Members Govern in Accordance with their Fiduciary Duties, Restrictions Against Conflicts of Interests and Other Requirements of Texas Law

Texas law requires the TRS Board Members to hold TRS's assets in trust solely for the benefit of the members and retirees of TRS and their beneficiaries.¹⁰ Accordingly, under Texas law, TRS Board Members owe fiduciary duties exclusively to TRS participants and their beneficiaries, including the duties of loyalty and care. These fiduciary duties are the polestars of all actions taken by the TRS Board, and TRS Board Members may be subject to liability if they violate their fiduciary duties.

Moreover, the Texas Legislature has enacted an array of statutes that govern the conduct of TRS Board Members and require that they carry out their TRS duties ethically and free of undisclosed conflicts. Following is a partial listing of the Texas laws that govern the conduct of TRS Board Members:

- Tex Gov't Code § 572.021 (requiring board members to submit publicly available detailed personal financial statements);
- Tex. Gov't Code § 572.051 (prohibiting certain gifts, employment that diminishes independence of judgment or requires disclosure of confidential information, investments that create a conflict of interest, bribes);
- Tex. Gov't Code § 572.002 (revolving door limitations);
- Tex. Gov't Code § 572.058 (requiring public disclosure and recusal if a board member has interest in certain decisions pending before the board);
- Tex. Gov't Code § 573.041 (prohibiting nepotism);
- Tex. Gov't Code § 825.210 (prohibiting board members from possessing interest in TRS investment);
- Tex. Gov't Code § 825.211 (prohibiting board members and certain relatives from being beneficiary of TRS investment or contract);
- Tex. Gov't Code § 2001.061 (prohibiting ex parte contacts in adjudicated matters);
- Tex. Gov't Code § 2203.004 (requiring state property to be used only for state purposes);

⁹ See Tex. Gov't Code § 825.002-003

¹⁰ See Tex. Const., Art. 16, § 67(a); Tex. Gov't Code § 802.201

- Tex. Gov't Code § 2254.032 (requiring disclosure of certain conflicts of interest relating to consultants);
- Tex. Penal Code § 32.43 (criminalizing bribery by fiduciaries);
- Tex. Penal Code § 32.45 (criminalizing certain misapplication of fiduciary property);
- Tex. Penal Code § 36.02 (criminalizing acceptance of bribes by public servant);
- Tex. Penal Code § 36.07 (criminalizing acceptance of honorarium);
- Tex. Penal Code § 36.08 (criminalizing acceptance of gifts from certain donors);
- Tex. Penal Code § 39.02 (criminalizing misuse of government property);
- Tex. Penal Code § 39.03 (criminalizing misuse of government office); and
- Tex. Penal Code § 39.06 (criminalizing misuse of government information).

In addition to the fiduciary duties and statutes that regulate trustee conduct, the TRS Board Members are also subject to the common law doctrines of conflict of interest and of incompatibility.¹¹ This array of constitutional, statutory, and common law regulation ensures that the TRS Board Members operate in a highly transparent and rigorous statutory and common-law ethics environment.

6. The Public Access to Board Meetings and Records Create Public Accountability

The TRS Board operates in public view. The deliberative and decision making process of TRS board meetings is subject to the Texas Open Meetings Act.¹² The Open Meetings Act prohibits deliberations by a quorum of the public body without statutory notice and access by the public. Members of the press, advocacy groups, beneficiaries and retirees attend these meetings, and the public is allowed opportunities to comment, as required by state law. TRS Board meetings are webcast live and archived on TRS's website.

TRS operations are subject to public scrutiny. TRS's policies, financial statements, actuarial valuations and other materials are available on its website. Other TRS records are publically available pursuant to the Texas Public Information Act.¹³

The public nature of TRS and its board governance make it accountable to the public and its participants and beneficiaries. Any transparency created by requiring the TRS Board to register with the SEC and comply with the requirements of the Municipal Securities Rulemaking Board ("MSRB") is duplicative and removed from the constituency TRS serves. We respectfully ask the SEC consider the accountability already fostered by TRS's public and transparent Board governance and apply the municipal advisor exception to both elected and appointed public board members.

¹¹ See also Op. Tex. Att'y Gen. No. GA-0351 (2005) (discussing the Texas common-law conflict of interest doctrine and stating that the doctrine did not invalidate a contract with a law firm predating when a board member joined the firm, but stating that the university system could not enter into a new contract while the board member is a partner); Op. Tex. Att'y Gen. No. GA 0671 (2008) (advising under the Texas Government Code that a county could not employ a subcontractor owned by one of its commissioners).

¹² See Tex. Gov't Code Ch. 551

¹³ See Tex. Gov't Code Ch. 552

7. TRS Board Members are Valued Citizen Volunteers

TRS relies on the expertise, community ties, and civic responsibility of its appointed board members. TRS Board Members are not paid for their service. Board members subject themselves to public scrutiny and devote an extraordinary amount of time and an effort to fulfilling their board duties. For example, in addition to previewing all meeting materials and attending all board meetings,¹⁴ the TRS Board receives periodic reports from staff and participates in beneficiary outreach events. State law requires Board members to complete training before taking their oaths of office, and to receive annual training and education. The duties of board members do not include giving each other “advice.” That they may express points of view in public meetings does not convert them into “municipal advisors” under the Exchange Act.

TRS’s ability to attract citizen volunteers is crucial to its governance. While some TRS Board Members have finance experience and familiarity with SEC compliance, our board, by statute, is traditionally composed of current and retired public school teachers, counselors, administrators, superintendants and higher education employees in addition to the members who have financial expertise. The additional liability, record keeping, and compliance of registering with the SEC and MSRB inhibit our ability to recruit and maintain a qualified pool of citizen volunteers willing to serve TRS. The SEC should consider the characteristics and existing demands of citizen governance and voluntary public service before imposing ill-fit registration requirements.

In conclusion, the SEC should consider both (i) the congressional intent embedded in the Dodd-Frank Act changes to the Exchange Act and (ii) the public policy reasons why both appointed and elected governing board members of public entities should be exempt from registration as municipal advisors under Section 15B of the Exchange Act.

Sincerely,



Ronnie Jung
Executive Director
Teacher Retirement System of Texas

cc: Teacher Retirement System of Texas Board of Trustees

¹⁴ In 2010, the TRS Board held seven board meetings, each lasting for one to three days.