



West Virginia Investment Management Board

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February 22, 2011

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

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

Dear Ms. Murphy:

The West Virginia Investment Management Board (WVIMB) respectfully submits its comments to the Securities and Exchange Commission (Commission) in connection with Release No. 34-63576 (Release) which proposes the adoption of Rules 15Ba1-1 to 15Ba1-7 [17 CFR 240.15Ba1-1 to 240.15Ba1-7]. Specifically, the WVIMB is responding to the Commission's request for comment with regard to the second full bulleted item on Page 51 of the Release. In that regard, we urge the Commission to **not** exclude from the definition of "municipal entity," any members of a governing body of a municipal entity, whether they are elected, appointed, or serve ex officio.

The practical, theoretical and statutory reality is that public plans and investment boards like the WVIMB, along with their governing boards, are the "owners" of the assets entrusted to them and **recipients** of advice, not the purveyors of advice. Even if they may somehow be defined as having a role in the issuance or investment of proceeds of municipal securities it is, again, as owners and recipients of advice, not as the providers of such advice. With that perspective, we respectfully submit that the Commission's interpretation of 15 U.S.C. §78o-4, as amended by Section 975 of the *Dodd-Frank Act (Act)*, turns the *Act* on its ear.

Discussion

The WVIMB is an arm of the State of West Virginia with a statutory mandate to invest assets of the State with long time horizons in the best interests of the beneficiaries of those assets. Assets currently include nine defined pension plans, eight insurance plans, a wildlife endowment fund, a prepaid tuition trust fund, and two revenue shortfall reserve funds. The governing board of the WVIMB is made

up of thirteen trustees. Three are ex officio members and ten members are appointed by the Governor from the private sector, with the advice and consent of the West Virginia Senate. Although private sector trustees are paid a nominal amount in compensation, we are essentially volunteers, as the amount does not nearly compensate for the time, effort and exposure to liability inherent in the role. All trustees are held to the standard of fiduciary care outlined in the *Uniform Prudent Investor Act*. The very title of the *Uniform Prudent Investor Act* seems to underscore the role a trustee plays, defining the trustee as an investor, not an advisor. The trustee must treat the assets entrusted to him as his own. Importantly, by statute, all WVIMB trustees and employees are personally liable for acts of gross negligence or misfeasance.

There are numerous other checks on the behavior of the trustees written into statute. They include open meeting laws, sunshine laws that make virtually every document a public record (monthly financial statements are available on the WVIMB's public website), annual audits by outside accounting firms with a national reputation, an internal audit staff reporting directly to the board, multiple reports to leaders in state government, staggered six-year terms, removal of trustees only for acts of misfeasance or gross negligence, and mandated political party diversity. Finally, all are subject to the *West Virginia Ethics Act* and all of its reporting requirements, proscriptions and investigative powers.

The board is required to meet four times a year, but generally meets more often. In addition, committees of the board meet more frequently in continual efforts to meet their fiduciary duties to the beneficiaries of the assets. The WVIMB's only role is to invest assets provided to it by the State or its political subdivisions. It has no ability to issue securities. Its mandate is to invest assets with long time horizons. The State of West Virginia additionally created another entity, the West Virginia Board of Treasury Investments, for shorter-term investments. To the extent the WVIMB invests moneys derived from the issuance of securities, its duty is to invest in the best interest of the beneficiaries of those assets. To be clear, the duty the WVIMB owes is to the beneficiary, not the sponsor. This is particularly instructive when applied to a defined benefit pension plan. The State of West Virginia is the sponsor of the defined benefit pension plans that transfer assets to the WVIMB for investment. The WVIMB's duty is not to the State of West Virginia, but to the beneficiaries of those assets. The WVIMB, also, does not make individual buy or sell decisions with regard to securities. The WVIMB delegates that responsibility to individual money managers. The trustees only approve the hiring of managers after hearing the recommendations of its staff and consultant.

It is important to note that all members of the governing board of the WVIMB, ex officio included, have an equal vote and role in governance of the entity. The board acts as a collective unit, as the decision-making organ of the whole body. While we cannot speak for other public plans or investment boards, we believe a casual investigation will reveal that they are similar to the WVIMB in most regards.

In the context of the *Act*, we urge the Commission to reject the distinctions it has made with respect to appointed members of the governing boards of public plans and investment boards (but not with regard to ex officio members)—which somehow excludes those governing boards from inclusion in the definition of "municipal entity"—and treat all governing boards and all individuals appointed or elected to serve on those boards, as part and parcel of the "municipal entity" for the purposes of 15 USC Section 78o-4(e)(4)(A).

We could outline the legal arguments here to support our views, but it is better done by reference to the comment letter submitted by the New York Teachers' Retirement System dated February 18, 2011. We support the analysis in that letter and also call attention to the comment letter submitted by the El Paso Firemen and Policemen's Pension Fund, also dated February 18, 2011, and which follows in the same vein. Both of these letters make cogent arguments and confirm the similarities among the many public plans and investment boards like the WVIMB.

Conclusion

A plain reading of the *Act* strongly suggests that the Commission is overreaching by requiring the registration as municipal advisors of appointed and elected trustees to the governing boards of public plans and investment boards. While the *Act* clearly suggests the intent of Congress was to require registration of professional advisors with regard to the issuance of municipal securities or the investment of their proceeds in the context of such issuance, it does not appear that Congress had any idea the Commission might apply the *Act* to investors themselves.

As noted, above, we are essentially volunteers charged with fiduciary responsibility for governing the entity, not as advisors, but as the decision-making organ of the entity itself. Our mandate is to treat the assets entrusted to us as our own. We invest significant time and energy in this organization to make sure we fulfill our duty prudently and wisely. There are already significant checks and balances applicable to the governance of the entity by operation of state law. To

add more would be costly and burdensome and likely have an adverse effect on the willingness of competent trustees to serve.

We strongly, but respectfully, urge the Commission to reconsider its interpretation and include all trustees of public plans and investment boards like the WVIMB as part of the entity itself, to the extent the entity is defined as a municipal entity under the *Act*. We are happy to respond to questions.

Sincerely,



Acting Governor Earl Ray Tomblin
Chairman of the Board



Glen B. Gainer III
Auditor of the State of West Virginia



Roger Hunter
Chairman of the Investment Committee



Guy Bucci
Chairman of the Legal Committee