

February 22, 2011

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

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

Dear Ms. Murphy:

We ask the Securities and Exchange Commission to consider the comments set forth below, with respect to the Commission's proposed final rules (the "Proposed Rules") implementing the municipal advisor provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). We offer these comments particularly from the perspective of governmental pension plans. Our Firm represents a number of governmental pension plans across the country, but we are not submitting these comments on behalf of any one particular plan. However, the comments and concerns that we express below with respect to the Act and the Proposed Rules are ones that we believe will affect a number of those plans.

In its Release (Release No. 34-63576) accompanying the Proposed Rules, the Commission states that the Act's exclusion from the definition of "municipal advisor" of employees of a municipal entity should include (i) persons serving as elected members of the governing body of a municipal entity,¹ and (ii) appointed, *ex officio* members of the governing body who hold that position by virtue of an elective office. The Commission states, however, that it does not believe appointed members of a governing body who are not elected *ex officio* members should be excluded from the definition of "municipal advisor."

In the Release, the Commission requested public comment as to whether that distinction is appropriate. We do not believe the distinction is appropriate because we do not believe it serves the goals of the Act.

¹ It is not clear from the Release whether the Commission's reference to "an elected member of the governing body of a municipal entity" means a person elected by the general public, a person elected by the plan participants (or a particular group of plan participants), or both. For the same reasons that we believe distinctions between appointed and elected board members are problematic and not necessary, we likewise believe such that distinctions also should not be made between board members who are elected by the public and those who are elected by plan participants.

Specifically, we ask that the Commission consider the following problems that we believe such a distinction would create for governmental pension plan boards and members of those boards:

- *Board members' role:* The role of pension boards and trustees does not constitute the type of activity sought to be regulated by the Act.
 - A primary question revolves around what "advice" entails under the Act and the Proposed Rules. The role of most trustees/board members is to oversee the assets and administration of their system. In order to do that, they seek advice and services from other fiduciaries they hire.
 - In most cases, trustees and board members hire registered investment advisors and money managers. The investment advisors work with the trustees and boards to establish investment guidelines and policies, set asset allocations, conduct manager performance reviews, complete asset liability modeling studies, and monitor money managers. The trustees and board members then adopt the investment guidelines and policy under which assets are invested, as well as making decisions on the hiring, performance, and retention of pension funds' investment managers and consultants. The money managers generally make decisions on specific investments as to their assigned portfolio. In some cases, they have sole discretion for specific investments.
 - Trustees and board members do not provide investment advice to participants in self-directed accounts, nor do they provide investment advice to the money managers they hire.
 - We recommend adding a definition of "advice" to the Proposed Rules that clearly distinguishes these functions.

- *State law already contains strong protections:* The Act's purposes are generally met by state laws. Activities of trustees and board members (whether elected or appointed) already are generally subject to requirements, such as:
 - State open meetings laws (with agendas, minutes, and public participation)
 - State public records requirements
 - State laws governing conflicts of interest and fiduciary responsibility
 - Regulation by State agencies or legislative bodies that oversee retirement matters
 - Pension plan provisions

- *Federal law already contains protections:* Additional regulation under the Act is not necessary because these trustees and board members (whether elected or appointed) are already subject to federal requirements, such as:
 - The requirement that all activities must be for the "exclusive benefit" of participants and beneficiaries in the pension system.
 - The prohibited transaction rules against transactions with plan sponsors.
 - The Commission's anti-"pay-to-play" regulations.

- *Appointed board members are accountable:* There is no reason to distinguish between appointed board members and other board members in order to further the Act's purposes.
 - Another primary question revolves around whether certain appointed pension plan board members should be treated as other board members are treated under the Proposed Rules – as exempted employees of a municipal entity. The Commission appears to be under the impression that there is a lack of accountability for those certain board members.
 - We believe that there is no need for the distinction because appointed board members are accountable to the citizens of the governmental entity in the same way as municipal employees.
 - Even though not elected, appointed board members are nonetheless subject to public scrutiny, in the same ways the other board members are.
 - They are subject to fiduciary duties, conflicts of interest laws, and other state and federal law and pension plan requirements that govern their activities as board members. Those duties are well prescribed and quite broad. Notice 2011-14 (issued February 14, 2011) issued by the Municipal Securities Rulemaking Board ("MSRB") contain a draft rule (G-36), which would establish fiduciary duties on municipal advisors. This would raise other issues as to how the Act, the Proposed Rules, and the new MSRB rules would be integrated with the current state and federal structure.

- *Registration requirement and duties may create conflict within a Board:* Treating appointed (non *ex officio*) trustees/board members differently from other board members could undermine the concepts of equal, shared co-trustee and co-fiduciary responsibility of all board members (regardless of how they "got" to the board). Treating certain board members differently from others also creates the potential for conflict among board members and a negative impact on the cooperative spirit of the board.

- *Additional costs for pension plans:*
 - Appointed board members will likely ask the plan to provide legal assistance and other assistance pertaining to the registration, record-keeping, and other requirements imposed by the Act, the Proposed Rules, and the MSRB requirements. Because ethical limitations may prevent the plan's legal counsel from providing advice to board members regarding their obligations under the Act and the Proposed Rules (for example, advising a board member as to whether or not he or she should register as a municipal advisor), board members will likely need to seek their own legal counsel and, as a result, might request that the plan reimburse them for such costs.
 - Even if an individual board member (and not the plan on whose board he or she serves) bears the responsibility under the Act and related regulations for determining whether or not he or she must register as a municipal advisor, the plan itself will want to be comfortable that those who serve on the board are not violating applicable laws.

As a result, a plan will likely incur legal and administrative costs of its own to ensure that board members satisfy their obligations, if any, under the Act.

- *Deterrent to board service*: The Proposed Rule could diminish public participation, rather than encourage an open process.
 - A registration requirement for appointed board members may deter them from serving on pension boards. In most cases, there is nominal or no compensation for this service.
 - It is not clear whether the Proposed Rules apply to advisory committees. To the extent that they do, we believe the Commission should consider that plans often create "advisory committees" (most often unpaid) of citizens to work with the pension plan board. These include advisory committees established by plan sponsors, as well as *ad hoc* committees and other such advisory groups created by pension boards. These committees review funding positions, benefit design, etc. Imposing registration requirements or other such requirements on these individuals may create a deterrent to serving on such advisory committees.

We also ask that the Commission state the following in the Proposed Rules with respect to the Act's exclusion of "an employee of a municipal entity" from the definition of "municipal advisor": The exclusion for employees of a municipal entity also includes the board members of a governmental pension plan who are employees of the special districts, cities, municipalities, and other governmental entities who participate as employers in the plan. As such, these individuals are "employees of a municipal entity," even though they are not employees of the plan itself. Although we believe that the Act is clear on this point, it is not clear from the Proposed Rules whether these board members would be excluded from the registration and other requirements for municipal advisors by virtue of being employees of municipal entities. Similarly, we believe that the Proposed Rules' exclusion for employees should extend to retired employees of a municipal entity, or former elected officials of a municipal entity, who continue to serve on a pension board. Clarification on those issues is needed.

Ms. Elizabeth M. Murphy

February 22, 2011

Page 5

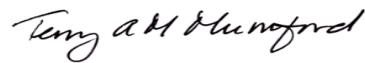
For all of the reasons listed above, we feel that the Proposed Rules, when finalized, should clearly provide that no member of the governing body of a municipal entity that is a public pension plan (whether elected or appointed), acting in his or her role as such, is subject to municipal advisor registration or any other requirements imposed by the Act or related regulations. We appreciate the opportunity to provide these comments. If you believe it would be helpful, we would be happy to elaborate upon any of our comments or to provide additional information.

Very truly yours,

ICE MILLER LLP



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