



# THE TEXAS STATE UNIVERSITY SYSTEM

Founded 1911

Thomas J. Rusk Building • 200 East 10<sup>th</sup> Street, Suite 600 • Austin, Texas 78701-2407  
(512) 463-1808 • Fax (512) 463-1816 • [www.tsus.edu](http://www.tsus.edu)

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*Port Arthur*

February 15, 2011

*By Electronic Mail*

Ms. Mary L. Schapiro, Chairman  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

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

Re: S.E.C. Release No. 34-63576: File No. S7-45-10 (Dec. 20, 2010)  
February 22, 2011

Dear Chairman Schapiro and Secretary Murphy:

This is in response to the Notice of Proposed Rule for the Registration of Municipal Advisors, issued by the Securities and Exchange Commission on December 20, 2010. This comment and the attached opinion memorandum of legal counsel are submitted on behalf of the Texas State University System Board of Regents. We write to express our concern that proposed regulations, requiring registration of appointed members as municipal advisors, misconstrue the role and functions these persons fulfill within the governance of the State of Texas. Further, we believe that the SEC's suggestion that these appointed members are not accountable for their actions is not only improvident but, plainly put, not true.

As the attached legal brief suggests, the State of Texas neither exists nor acts in a vacuum but rather through the policy deliberations and decisions of its 400 boards, commissions, authorities, and committees. In higher education, 10 university governing boards exercise set policy over several dozen campuses statewide, educating the state's one million public university students. When they exercise that authority, these appointed public officials

Ms. Mary L. Schapiro, Chairman  
Ms. Elizabeth M. Murphy, Secretary  
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are not financial advisors but rather the human manifestation of the sovereign State of Texas.

Addressing the SEC's concern that these public officials are not accountable for their conduct in office, such is simply not the case. Apart from the constitutional impeachment process to which these officials are subject, as well as the regulatory accountability imposed under the State's stringent ethics code and extensive financial disclosure laws, these appointed officials are bound by a public funds investment act and the regulatory strictures of the state's higher education coordinating board. Further, approval of the state's bond review board and of the attorney general of Texas is required before these public officials can issue bonds. Failure to comply with the above requirements can result in impeachment from office, institution of a civil lawsuit, and/or criminal prosecution. That is accountability!

We are confident that the Securities and Exchange Commission will recognize that statewide appointed, policy-making officials are not financial advisors but, functionally, the State of Texas and, in any case, that sufficient accountability exists, contrary to the SEC's initial impression.

We appreciate the opportunity to provide comment on the proposed regulations.

Respectfully submitted,



Brian McCall, Ph.D.  
Chancellor

Enclosure

Members, Board of Regents



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## MEMORANDUM

**To:** **Brian McCall, Ph.D.**  
**Chancellor**

**From:** **Fernando C. Gomez**   
**Vice Chancellor and General Counsel**

**Carol Pumbo**   
**McCall, Parkhurst and Horton**  
**Bond Counsel**

**Re:** **Securities and Exchange Commission's proposed rules, defining "Municipal Advisor" to include appointed state officers**

**Date:** **February 15, 2011**

You have requested a legal opinion as to the meaning and impact of the Securities and Exchange Commission's (the "SEC") proposed rules, defining "Municipal Advisor" to include appointed state officers, such as members of the Texas State University System Board of Regents. In our opinion, statewide appointed regents serve a qualitatively different function than the financial advisors that the proposed regulations target. Further, we believe that the SEC fails to recognize that the Texas constitution and laws regulate these officials extensively, such that the SEC's concern about accountability has been amply met. For these reasons, detailed below, we recommend that the Texas State University System submit comment advising the SEC of the improvidence of its proposed rules.

### The Proposed Rules

The SEC has issued proposed rules regarding implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") that requires municipal advisors to register with the SEC and the Municipal Securities Rulemaking Board (the "MSRB"). The term "municipal advisor" is

defined by the SEC as a person (who is not a municipal entity or an employee of a municipal entity) that 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 undertakes a solicitation of a municipal entity.

Although it is a branch of the sovereign State of Texas, the Texas State University System (the "System") is defined under the SEC's proposed rules as a municipal entity. The SEC considers elected members of such an entity to be employees and, therefore, exempt from the definition of "municipal advisor." Curiously, the SEC does not exclude however, appointed members of such a governing body unless they are ex officio members by virtue of holding an elective office. The SEC explains that it made such distinction because it was concerned that appointed officers, unlike elected or ex officio members, are not directly accountable for their performance to the citizens.

We do not believe such interpretation is correct and contend that governor-appointed, senate-confirmed state officers serving as the governing body of a statewide university system have an equal amount of accountability as elected officers, if not more, for all of the reasons provided herein. We do not believe that these individuals should be required to register as municipal advisors.

#### The Texas State University System Board of Regents Is the State of Texas

In its delegated area, the Board of Regents is the State of Texas. The Texas State University System is governed by a Board of Regents, comprised of nine members appointed by the Governor of the State and subject to confirmation by the Texas Senate. Additionally, one student is annually appointed to the Board as a nonvoting regent. The Board of Regents is the decision-making body with plenary authority over the System. *Chapters 95 and 96 of the Texas Education Code* articulate the powers of the System; *Section 95.01* in particular states the organization, control and management of the System is vested in the Board of Regents. Without the governing body and its appointed members, the System does not and cannot exist or function. In effect, the Board of Regents constitutes the State of Texas itself, exercising its sovereignty through individual members. To denigrate these public officials to the status of paid financial advisors is seriously to misconstrue the workings and functions of state government.

### Appointed State Officers Do Not Provide Advice

As appointed state officers, the members of the Board of Regents deliberate and make decisions only as a collective governing body. Any action that is taken by the Board must be voted by a majority of its appointed officers with a quorum present and then only at a properly called and noticed public meeting. The discussion process that the Board collectively goes through to vote on each action taken does not constitute the rendering of "advice." An individual appointed officer does not recommend a decision to the Board. Rather, each appointed state officer reviews the information and advice rendered to the Board so that each appointed state officer makes an individual decision on how to vote. The majority vote of the Board then dictates the approval or disapproval of such action.

The Texas *Open Meetings Act* nowhere delegates to these Board members the authority to recommend but rather defines them, in pertinent part, as a "governmental body" that is within the executive or legislative branch of state government . . . ." *Texas Government Code, section 551.001(3)(A)*. Therefore, an appointed state officer serving on the Board is not rendering "advice" to the municipal entity, but rather is serving as part of the deliberative and decision-making process that is integral to the function of a governing body of a state. Nor are these political appointees selected to provide financial expertise, or directed at the time of appointment that they are expected to fulfill this role. Nowhere in their enabling legislation or elsewhere in Texas law is this duty imposed.

### Appointed State Officers Are Subject to Strict Accountability Requirements

In order to be considered for the position of an appointed state officer on the Board of Regents, an individual must go through a stringent application and appointment process, including filing personal financial statements. Additionally, a Regent is subject to confirmation hearings by the Texas Senate, an elected legislative body. As an appointed officer, each Regent must take an oath of office at which he or she is sworn in as a state officer.

As such, he or she is subject to the requirements and regulations provided by Texas ethics laws. During an appointed state officer's term, the *Texas Government Code, section 572.023* requires the officer to file comprehensive financial statements yearly that include:

- (a) Individual and family finances; and
- (b) Financial activities, including:
  - Occupational income

- Securities held, acquired, or sold (and net gain or loss if sold)
- Interest, dividend, royalty, trust, or rental income in excess of \$500
- Cosignatory obligations in excess of \$1,000
- Real property or business interests held, acquired or sold (and net gain or loss if sold)
- Personal or family member gifts in excess of \$250
- Assets and liabilities of any business entity in which 50 percent or more of the entity was held, acquired, or sold.
- Boards of directors of which the officer is a member
- Identification of persons providing transportation, meals and lodging
- Registration as a lobbyist
- Mutual funds held, acquired or sold (and net gain or loss if sold)
- Identification of data to be reported from blind trusts

The financial statements required to be filed by appointed state officers are public records.

In addition to financial statements, *section 572* of the Texas *Government Code* sets forth the standards of conduct an appointed state officer must abide by and any conflicts of interest that an appointed officer may have that must be disclosed. The standards of conduct an appointed state officer is required to comply with under *section 572.051* of the Texas *Government Code* include the duty to maintain independent judgment, avoid conflicts of interest, not solicit or accept benefits for exercising one's duties and not disclosing confidential information.

The Texas Ethics Commission oversees and enforces the laws governing state officers. Any complaints against a state officer are filed with the Texas Ethics Commission, and if the commission finds the officer in violation of Texas ethics laws, enforcement action can be taken, including civil penalties; in addition, the commission can refer the matter to the state prosecutor's office for criminal prosecution. In brief, failure to comply with such standards can result in civil or criminal liability, including imprisonment.

In addition to civil and criminal penalties, an appointed state officer can be impeached from office in the same manner as the governor, lieutenant governor, legislators, judges, and other elected officials. *Texas Constitution, Article 15, sections 1-9; Government Code, section 662.002.*

Finally, all actions by the Board of Regents are subject to public disclosure and scrutiny under the State *Open Records Law*. Therefore, there is an extraordinary amount of oversight and accountability an appointed state officer such as the Board of Regents is subject to under Texas law, which clearly provides strict standards of conduct and penalties for violation of such standards. We believe that, in stating its concern that appointed state officers are not directly accountable to the citizens they serve, the SEC was unaware of these requirements.

#### Requirements for Bond Issuances and Investment of Public Funds

As a further measure of accountability, Texas law requires the Board of Regents to receive approval from several state agencies prior to issuing bonds; moreover, the issuance of bonds must also be approved by the Texas Bond Review Board, which is a state agency composed of the Governor, the Lieutenant Governor, the Comptroller of Public Accounts and the Speaker of the Texas House of Representatives, all being elected officials with the exception of the Speaker who is an elected state representative, selected to his leadership role by his colleagues in the Texas House of Representatives. Additionally, the issuance of bonds must be reviewed and approved by the Texas Attorney General's Office, which is an elected office, and the Texas Higher Education Coordinating Board, which must approve the projects related to bonds prior to issuance. Therefore, a number of approvals by elected officials is required before the Regents can issue bonds.

Texas law also imposes strict guidelines regulating the System's investment of public funds. These laws require the Board of Regents to exercise and maintain a high standard of judgment and care when investing public funds. In order to comply with Texas law, the Board of Regents must adopt an investment policy and investment strategy that must be reviewed at least annually. See, *Public Funds Investment Act, Government Code, section 2256.001 et seq.* In addition, the Board itself requires that quarterly reports showing the investments of the System are provided to it.

The appointed state officers on the Board of Regents must undergo training to understand Texas law regarding sound investment policies and practices. The requirements under Texas law for the issuance of bonds and investment of public funds further exhibit the amount of regulation and accountability for appointed state officers, particularly in relation to the board's participation in the municipal securities market. While the law requires that they be familiar with these matters so that they can make informed decisions as policy-making board members, it does not require that

they acquire the in-depth knowledge of financial advisors, many of whom are formally trained to provide such service, thereafter spending their careers dealing with the nuances and intricacies of complex financial markets and transactions.

### Closing

Due to the fact that the Board of Regents of the System is the decision-making body—that is, the “municipal” entity itself—its decision-making processes consist of deliberative discussions that do not constitute giving “advice” and the strict accountability requirements imposed by the State of Texas that each appointed state officer must comply with in order to serve as a Regent, such appointed officers, exercising the plenary authority of the State of Texas, should not be included in the definition of a “municipal advisor” under federal securities laws and should not be required to register as municipal advisors.

Valuable talent will be lost because prospective appointees to the Board of Regents will not want to subject themselves to the additional regulations of the SEC and the MSRB. Even those prospective appointees to the board who would otherwise provide the required information, will, however, refuse to be subject to the oversight and regulations of the rules imposed by the SEC and the MSRB as a municipal advisor. The extent to which such rules and regulations will dissuade talented people from serving on boards cannot be measured. However, the State of Texas relies on volunteers to serve on state agency boards such as the Board of Regents, and the risk of depleting the pool of talented citizens far outweighs the benefit of requiring appointed state officers to register as municipal advisors with the SEC.