AGB ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES

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February 15, 2011

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

Re: Proposed Rule: Registration of Municipal Advisors
Release No. 34-63576 (December 20, 2010)
File No. S7-45-10

Dear Ms. Murphy:

The Association of Governing Boards of Universities and Colleges (AGB) respectfully submits this letter in response to the proposed rule regarding the registration of municipal advisors posted in the Federal Register on January 6, 2011, File Number S7-45-10. Our comment focuses on the definition of "municipal advisor" in proposed rule 15a1-1(d).

Introduction

AGB is the only national association that serves the interests and needs of all academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership. We serve more than 40,000 individuals at over 1,900 colleges, universities, and affiliated organizations. The board members of our member institutions hold various titles, such as "trustee" or "regent," and are referred to here as trustees.

Unlike corporate directors, trustees of public and non-profit colleges and universities are not compensated for their board service. They are unpaid volunteers who devote their time, experience, and talent to serving the public interest. In total, approximately 50,000 men and women serve as volunteer trustees of public and private colleges and universities in the United States. An additional 45,000 volunteers serve on the boards of institutionally related foundations, which are private 501(c)(3) organizations that raise and manage funds for public colleges and universities.

These individuals' service protects institutional independence and autonomy and is essential to effective governance. Our nation's economic health, global competitiveness, and civic well-being depend upon the willingness of exceptionally talented, highly qualified individuals to serve as volunteer trustees for higher education institutions. Measures such as the instant proposal to regulate volunteer trustees as municipal advisors threaten the longstanding volunteer-board governance model that is vital to American higher education's preeminence in the world.

The proposed rule could be construed to require trustees of colleges, universities, and institutionally related foundations to register as municipal advisors.

Public and non-profit colleges and universities are active participants in the municipal securities markets. Municipal securities provide higher education institutions with a low-cost source of capital, which they use to build, repair, and refurbish facilities and fund teaching and research. We support the goals of the Dodd-Frank Act and the SEC of ensuring appropriate oversight of advisors to municipal entities and conduit borrowers. However, it is imperative that the quality of institutional governance not be compromised by counterproductive, needless, burdensome, and off-putting regulation of trustees acting in their fiduciary capacity.

Accordingly, although we commend the Commission for clarifying that elected board members of municipal entities, including elected trustees of public colleges and universities, will not be required to register as municipal advisors, see 76 Fed. Reg. 824, 834 (Jan. 6, 2011), we are concerned that the proposed definition of "municipal advisor" could be construed to include appointed trustees of public universities, trustees of private non-profit universities, and trustees of institutionally related foundations, who are not explicitly exempted from the registration requirement. Trustees who discuss municipal financial products at board meetings and authorize institutional participation in municipal securities offerings conceivably could be viewed as providing "advice" (a term neither the Act nor the proposed rule defines) to an "obligated person" and thus become subject to regulation as municipal advisors.

Such a result would conflict with Congressional intent, interfere with trustees' fiduciary responsibilities, and collide with the Commission's longstanding interpretation of the term "advisor." It would also significantly hinder the ability of public and private colleges and universities to attract and retain highly qualified trustees with financial expertise, to the detriment of these institutions, their students and faculty, and the nation.

For these reasons, we urge the Commission to exclude from the definition of "municipal advisor" persons acting in their capacity as trustees of colleges, universities, and institutionally related foundations.

Congress did not intend to regulate trustees of colleges, universities, and institutionally related foundations.

As the Commission has implicitly recognized, Congress did not intend to regulate college and university trustees when it enacted the municipal advisor provisions of the Dodd-Frank Act. Rather,

Congress sought to regulate "market professionals," "market participants," and market "intermediaries." See 156 Cong. Rec. S10921 (Dec. 21, 2010) (statement of Sen. Dodd); S. Rep. No. 111-176, at 147-48 (2010). Similarly, the Municipal Securities Rulemaking Board's 2009 report on unregulated municipal market participants focused on "financial advisory firms" and other "market participants." See Municipal Securities Rulemaking Board, Unregulated Municipal Market Participants: A Case for Reform 1 (Apr. 2009). The deliberate and repeated use of such phrases indicates that Congress understood section 975 to reach professional advisors participating in the market for financial advice, not trustees discharging their governance duties.

The Commission confirmed that view in the preamble to the proposed rule, where it stated:

> [T]he statutory definition of "municipal advisor" includes distinct groups of professionals that offer different services and compete in distinct markets. The three principal types of municipal advisors are: (1) financial advisors, including, but not limited to, broker-dealers already registered with the Commission, that provide advice to municipal entities with respect to their issuance of municipal securities and their use of municipal financial products; (2) investment advisors that advise municipal pension funds and other municipal entities on the investment of funds held by or on behalf of municipal entities (subject to certain exclusions from the definition of a "municipal advisor"); and (3) third-party marketers and solicitors.

76 Fed. Reg. at 829.

The Commission's cost estimates reflect the same understanding of Congress's intent. The Commission projected that approximately 21,800 natural persons would be required to register as municipal advisors. That figure represents the total number of (1) individual investment advisors and/or broker dealers, (2) individuals employed at financial advisor firms, and (3) individuals employed at solicitation firms. 76 Fed. Reg. at 865 & n.300. Board members and employees of obligated persons are not part of the calculation, and the estimated cost of the proposed rule would be substantially higher if they were counted.

College and university trustees are decision-makers, not advisors.

To regulate trustees as municipal advisors is to misunderstand profoundly their role and legal status. The board of trustees of a university is fundamentally a governing body. See Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 651 (1819) (Marshall, C.J.) ("the whole power of governing [Dartmouth] college . . . was vested in the trustees"); 2 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 505; American Bar Association, Model Nonprofit Corporation Act § 8.01(b) (3d ed. 2008). Corporate charters, common law, statutes, and state constitutions vest in university boards broad powers to govern the institution. When trustees discharge their duties, they act <u>for</u> the institution, not as advisors to it. See Crowe v. Gary State Bank, 123 F.2d 513, 516 (7th Cir. 1941); Flarey v. Youngstown Osteopathic Hospital, 783 N.E.2d 582, 585 (Ohio Ct. App. 2002).

This distinction between decision-maker and advisor is not only well-settled, it has often been cited as vital to good governance. See, e.g., American Law Institute, Principles of the Law of Nonprofit Organizations § 320 cmt. b(3) (Tentative Draft No. 1, 2007). An interpretation of the Dodd-Frank Act that conflated the functions of trustee and advisor would be erroneous.

Classification of trustees as municipal advisors would be contrary to the Commission's longstanding interpretation of "advisor."

In construing the term "municipal advisor" under the Dodd-Frank Act, the Commission should bear in mind its own interpretation of similar laws. For example, under the Investment Advisers Act of 1940, any person who engages in the business of providing investment advice for compensation is generally considered an investment advisor subject to the Act's registration requirement. See Applicability of the Advisers Act to Financial Advisors of Municipal Securities Issuers, SEC Division of Investment Management Staff Legal Bulletin No. 11 (Sep. 19, 2000); see also Zinn v. Parrish, 644 F.2d 360 (7th Cir. 1981). Yet despite the broad definition, Commission staff has consistently declined to regulate as advisors people whose advice is limited to internal communications within an organization. In the staff's view, such internal relationships are "unlike the commercial relationship between an investment advisor and its client that the Advisers Act was intended to regulate." Employer Sponsors of Defined Contribution Plans, SEC No-Action Letter, 1995 WL 931811 (Dec. 5, 1995) (addressing employer-employee relationship); see also CIGNA Capital Advisers, SEC No-Action Letter, 1985 WL 54367 (Sept. 30, 1985) (addressing parent-subsidiary relationship).

The same is true of trustees under the Dodd-Frank Act. Unlike advisors, trustees fulfilling their governance responsibilities on a board are not engaged in the business of providing advice regarding securities. Moreover, whereas trustees are decision-makers, advisors have no decision-making authority; the board is free to accept their advice or not. For these reasons, the relationship between a trustee and the institution is "unlike the commercial relationship between [a municipal advisor] and its client that the [Dodd-Frank] Act was intended to regulate."

SEC regulation of college and university trustees' conduct is not needed, where such conduct is already regulated.

Regulation of trustees' conduct under the Dodd-Frank Act is not only contrary to legislative intent and inconsistent with longstanding Commission interpretation of "advisor," it is also unnecessary. The conduct of trustees of colleges, universities, and institutionally related foundations is already subject to a multitude of laws. Trustees must comply with state not-for-profit corporation law; fiduciary duty laws; institutional policies, such as policies on conflicts of interest; state education law; the standards of accreditation bodies; IRS rules for tax-exempt organizations; and multiple other regulatory regimes.

As corporate fiduciaries, for example, trustees must obey the duty of loyalty, which requires that they exercise their powers in good faith and in the best interest of their institution, and not in their own interest or for the benefit of another person. See American Bar Association, Model Nonprofit Corporation Act § 8.30 (3d ed. 2008); Charities Bureau, Office of the N.Y. Attorney General, Right from the Start: Responsibilities of Directors and Officers of Not-for-Profit Corporations 7 (Jan. 2007);

Charities Bureau, Office of the N.Y. Attorney General, The Regulatory Role of the Attorney General's Charities Bureau 4 (July 15, 2003). State not-for-profit corporation laws require boards to address trustee conflicts of interest and to ensure that business transactions are in the best interests of the corporation. Trustees also must comply with institutional conflict of interest policies. See, e.g., Association of Governing Boards of Universities and Colleges, AGB Board of Directors' Statement on Conflict of Interest (Nov. 20, 2009), available at http://www.agb.org/conflict-interest. State codes of conduct and ethics laws require trustees to disclose and avoid conflicts and act in the interests of the institutions they serve. See, e.g., Office of General Counsel, California State University, Conflict of Interest Handbook (Apr. 30, 2004), available at http://www.calstate.edu/Csp/crl/ref/CRL056.pdf; University of California, Business and Financial Bulletin G-39: Conflict of Interest Policy and Compendium of Specialized University Policies, Guidelines, and Regulations Related to Conflict of Interest (Feb. 24, 2010), available at http://www.ucop.edu/ucophome/policies/bfb/g39.pdf. Accreditation standards provide an additional layer of regulation. See, e.g., Southern Association of Colleges and Schools, Resource Manual for Principles of Accreditation: Foundations for Quality Enhancement § 3.2.3, at 26 (2005) (requiring the governing board of an accredited institution to have a conflict of interest policy for its members). In rare instances of noncompliance, trustees are subject to suit in state court for breach of fiduciary duty as well as to government enforcement action, removal, and civil and criminal penalties. See, e.g., American Bar Association, Model Nonprofit Corporation Act § 8.31 (3d ed. 2008); N.Y. Educ. Law § 216-a(d)(9); N.Y. Not-for-Profit Corp. Law § 720.

Trustees are thus accountable to the institutions they serve, state regulators, and institutional accreditation bodies. Accordingly, SEC regulation of trustees acting as fiduciaries is unnecessary.

The extensive prevailing regulation of trustees amply meets any pertinent concern the Commission may have. For example, because trustees are subject to state law fiduciary duties and institutional and state-law conflict of interest and ethics rules, the articulated concerns about the absence of such provisions for municipal advisors do not apply in the case of trustees. See 15 U.S.C. § 78o-4(b)(2)(L)(i), (c)(1) (fiduciary duties of municipal advisors). In short, there is no sound reason to make college and university trustees subject to SEC regulation of municipal advisors.

SEC regulation would interfere with trustees' ability to fulfill fiduciary obligations and would hinder institutional efforts to attract and retain highly qualified trustees.

Trustees, as fiduciaries, owe a duty of care to the institutions they serve. As part of that duty, they have an obligation to be informed and to ask questions of management or advisors until they are satisfied that all information pertinent to a decision is before the board and has been considered. If not modified, the proposed rule could chill board discussion about municipal financial products and thereby impair trustees' ability to fulfill their fiduciary duties. If the Commission takes a broad view of "advice," or if it leaves the term undefined, trustees may fear that they will be deemed municipal advisors by virtue of their participation in board discussion or votes on covered transactions. Any such hesitancy to engage in robust and candid discussions would impede sound decision-making and deprive the institutions—and ultimately the bondholders—of the benefit of the trustees' considered deliberations.

Were trustees considered municipal advisors, the burdensome requirements incident to registration with the Commission would hinder higher education institutions' (and for public institution boards, the appointing authorities') ability to recruit and retain the most qualified persons to serve as trustees. Compliance with the proposed rule's registration requirement would be significantly burdensome and off-putting for volunteer trustees. A municipal advisor subject to the proposed rule's registration requirement would be required to disclose, among other things: (i) personal information and employment history; (ii) information regarding past felony charges or convictions, violations of securities rules and regulations, and civil judicial actions or settlements involving the violation of investment or municipal advisor statutes or regulations; (iii) information regarding consumer complaints or arbitrations regarding investment-related matters; and (iv) information regarding bankruptcy or similar proceedings in the last ten years, judgments, or denial of any bonds. Such information would be maintained by the Commission and accessible to the public. A municipal advisor would also be required to certify that he or she, and every natural person associated with him or her, has met or will meet the standards of training, experience, competence, and other qualifications, including testing, required by the Municipal Securities Rulemaking Board or the Commission. Municipal advisors would also have to comply with certain recording-keeping requirements.

As the Commission has already recognized, these requirements would deter some individuals from engaging in municipal advisory activities. See 76 Fed. Reg. at 876. Whereas municipal advisory firms may be able to offset the burdens of compliance, volunteer trustees are differently situated. Institutions of higher education are challenged to attract the most highly qualified volunteers to invest uncompensated time in trusteeship. A perception that trustees may be deemed municipal advisors would exacerbate this challenge, particularly with regard to recruitment of persons with financial expertise.

Conclusion

For reasons set out above, AGB strongly urges the Commission to clarify that persons acting in their capacity as trustees of colleges, universities, and institutionally related foundations are not municipal advisors.

AGB is deeply concerned about this matter, considers it a priority, and is available, to Commission staff, to supply additional information or address further the foregoing and related points.

Sincerely,

Richard D. Legon
President