



MARYLAND
STATE RETIREMENT
and PENSION SYSTEM

STATE RETIREMENT AGENCY
120 East Baltimore Street
Baltimore, MD 21202
Tel: 410-625-5555
1-800-492-5909
TDD/TTY 410-625-5535
www.sra.state.md.us

R. Dean Kenderdine
Executive Director
Secretary To The Board

February 17, 2011

Via Electronic Mail: rule-comments@sec.gov

Elizabeth M. Murphy
Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

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

Dear Ms. Murphy:

The Maryland State Retirement and Pension System (the "System") appreciates the opportunity to respond to the Commission's request for comment on proposed rules relating to the registration of municipal advisors as set forth in Release No. 34-63576 (the "Release").

The System is managed by a 14-member Board of Trustees, and administers death, disability and retirement benefits on behalf of more than 350,000 members, including active and former employees, teachers, State police, judges, law enforcement officers, correctional officers and legislators of the State of Maryland. At December 31, 2010, the System's assets totaled approximately \$36 billion. The Board of Trustees has the following high-level functions:

- Direct the management of a multi-billion dollar investment portfolio
- Adopt the actuarial assumptions necessary to properly fund the System
- Approve qualified disability retirements
- Adopt rules, regulations, policies, and procedures necessary to administer the various plans

Section 15B of the Securities Exchange Act of 1934, as recently amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, (the "Act") requires that "municipal advisors" register with the Commission and become subject to related requirements imposed by statute and regulation. Section 15B specifically excludes a "municipal entity" and the employees of a "municipal entity" from the definition of

“municipal advisor.” In the Release, the Commission extended the exclusion to elected members of a governing body of a “municipal entity” as well as *ex officio* members who sit on a board by virtue of holding a certain elective office. However, the Commission took the interpretive position that an “appointed” member of a governing body of a “municipal entity” would not be covered by the exclusion from the definition of “municipal advisor.” The Commission’s stated rationale for the distinction between elected or *ex officio* members and appointed members is that the Commission staff believes that appointed members are not directly accountable to citizens for their actions and performance as a member of the governing body of a municipal entity. The Commission also stated in the Release that a pension system is a “municipal entity” for purposes of the Act and related regulations.

We respectfully submit that the Commission’s interpretation of the application of the definition of “municipal advisor” is overly broad with respect to members of the board of a public pension system. We urge the Commission to make clear in the final rules that a member of a governing body of a “municipal entity” shall not be deemed to “give advice,” and therefore does not meet the definition of a “municipal advisor,” simply because the member engages in discussion, debate, policy making or decision making relating to investment matters in connection with the member’s duties as a member of the governing body. The application of the definition of “municipal advisor” is particularly inapposite when the governing body is advised on investment matters by a third party that is subject to regulation under federal securities laws, as is the case for the System and many other public pension plans.

In addition, the Commission’s rationale for the distinction between the treatment of (a) elected or *ex officio* members of a governing body and (b) appointed members of a governing body is not relevant with respect to the governing body of a public pension system which has fiduciary obligations, and other statutory and regulatory obligations that promote and require accountability on the part of the members of that governing body. As such, we urge the Commission to exclude from the definition of “municipal advisor” *all* members of the governing body of a public pension system.

Finally, we believe the Commission should modify the scope of the definition of “employee” of a “municipal entity” for purposes of clarifying the availability of the exclusion from the definition of “municipal advisor.” We urge the Commission to extend to persons who serve *ex officio* as a member of the governing body of a “municipal entity,” by virtue of their status as an employee or officer of the jurisdiction in which the “municipal entity” is located, the exclusion from the definition of “municipal advisor” which now covers the employees of the “municipal entity.”

Members of the System’s Board of Trustees Do Not Provide “Advice” Regarding Investments

By statute, the System’s Board of Trustees is charged with “the responsibility for the management, general administration, and operation” of the System.¹ The business and operations of the System are administered by the State Retirement Agency (the “Agency”)², and the Agency’s Investment Division has responsibility for investing the System’s assets as the

¹ Section 21-108 (a)(1) of the State Personnel and Pensions Article of the Annotated Code of Maryland (“SPP”).

² Section 21-119 of the SPP.

Board of Trustees specifies.³ The Board of Trustees has full power to invest the assets of the System, subject to conditions it may impose and subject to the sole authority of the System's Chief Investment Officer ("CIO") to select and invest in specific investment vehicles and to engage and terminate investment managers that invest the System's assets.⁴ The Board of Trustees does not select individual investments, investment managers or investment vehicles, but does set policy for asset allocation. In doing so, the Board of Trustees relies not only on the advice of a general investment consultant, a private equity consultant and a real estate investment consultant, but also on the analysis of the CIO and the investment division staff. The CIO and Investment Division staff are employees of the Agency, and thus are excluded from the definition of "municipal advisor."⁵ The System's consultants are registered under the Investment Act of 1940 and therefore also are exempt from regulation as a "municipal advisor."⁶

Although the Commission has not defined the meaning of "advice" in the context of regulation of "municipal advisors," we note that the Commission has highlighted the following types of activities in this context: advice relating to the issuance of municipal securities or swap transactions, guaranteed investment contracts, and investment strategies (including advice with respect to the structure, timing, terms, and other similar matters concerning such issues or financial products). The System's Board of Trustees, in making decisions as fiduciaries, simply is not engaged in offering advice with respect to structure, terms "or similar matters" concerning financial products or the investment of System assets. The Board *receives* advice from the Agency's professional investment staff and from regulated consultants and advisors, and then acts on that advice in the exercise of the Board's responsibilities as fiduciaries of the System. Although the Board by statute is charged with responsibility to invest the System's assets, the Board members do not render "advice" in the course of discharging their statutory duties as fiduciaries. Debate, discussion and review of investment options and policies – the foundation of the responsible exercise of a governing body's governance responsibilities and fiduciary duty – do not constitute "advice" and should not be interpreted as such. We believe the Commission must clarify this in the final rules relating to the registration of "municipal advisors," to eliminate confusion about the scope of activities that constitute "advice." Deliberation and discussion among public pension system trustees relating to investment issues cannot be equated with "advice" rendered by market professionals.

Furthermore, a "municipal entity" is excluded from the definition of "municipal advisor." A "municipal entity" can act only through its governing body or employees to whom authority has been delegated. The governing body should be viewed as the functional equivalent of the "municipal entity" for purposes of analysis of the scope of the term "advice." A governing body does not "give advice to itself." Rather, a governing body deliberates and makes decisions on the basis of information available to its members. As numerous comment letters have noted, the proposed regulations have the effect of "turning on its head" the concept of "advice" and inadvertently transforming decision makers into advisors, with the result that very likely "chills

³ Section 21-122 of the SPP.

⁴ Section 21-108 (c) of the SPP.

⁵ Section 15B(e)(4)(A) of the Act.

⁶ Section 15B(e)(4)(C) of the Act.

informed analysis and debate --exactly the opposite of the result the SEC should be seeking to encourage.”⁷

The Exclusion from the Definition of “Municipal Advisor” Should Cover Elected or Ex Officio Members of the System’s Board of Trustees As Well As Appointed Members

The Commission’s stated rationale for distinguishing between elected officials and appointed board members when recommending the registration of appointed members while giving elected members an “automatic” exclusion is puzzling. The Release states that Commission staff believes that appointed board members are “not accountable” to the public in the same manner as elected members or *ex officio* members who serve by virtue of elected office, and therefore should be subject to regulation. We think that staff may not have a full understanding of the high degree to which appointed members of public pension plan boards – and, particularly, the System’s Board of Trustees – are accountable.

The scope of the Board members’ fiduciary duties, standards of care, provisions for liability for breach of duty, limitations on certain transactions and conduct, and circumstances for disqualification of a fiduciary as well as related penalties are set forth in Maryland law.⁸ *All* members of the Board are held to the same standards regardless of whether they hold their position by virtue of elected office, election by a particular constituency of System participants and retirees, or appointment by the Governor. These provisions of law hold the Board of Trustees accountable to the participants in the System as well as the citizens of Maryland.

In addition, all members of the System’s Board of Trustees are subject to Maryland’s ethics laws.⁹ Board members are required to make financial disclosures with the State Ethics Commission and are held accountable for meeting standards of conduct set forth in State ethics laws. The Board’s meetings are subject to Maryland’s Open Meetings Act and the minutes of those meetings are available to the public in accordance with that law.

Most importantly, in Maryland, the members of the System’s Board of Trustees, including appointed members, are deemed “public officials” with resulting accountability under the Maryland Constitution. Article 6 of the Declaration of Rights of the Maryland Constitution requires that public officials are “accountable for... [their] conduct.” As should be clear from the foregoing, there is no basis for distinguishing among different members of the System’s Board of Trustees with respect to the degree of accountability to the citizenry or making a determination that certain of the members should be regulated under federal securities laws.

The Treatment of Certain Ex Officio Board Members Does Not Make Sense Under State Law

The composition of the System’s Board of Trustees is mandated by Maryland law.¹⁰ Only one member, the State Comptroller, serves *ex officio* by virtue of holding elective office. Two members, the State Treasurer and the Secretary of Budget and Management, serve *ex officio*, but

⁷ See, e.g., January 19, 2011 letter for Jacqueline M. Kovilaritch, Assistant City Attorney, City of Petersburg, Florida.

⁸ Subtitle 2. *Fiduciary Responsibilities* of the SPP.

⁹ Section 15-103 of the State Government Article of the Annotated Code of Maryland.

¹⁰ Section 21-104 of the SPP.

by virtue of their positions which are not elected by Maryland's voters.¹¹ Five Board members are elected by members and retirees of constituent retirement systems that comprise the System. Five additional Board members, who represent the public, are appointed by the Governor with the advice and consent of the Maryland Senate. An additional Board member, representing the interests of participating governmental units, is appointed by the Governor.

Under the rules proposed in the Release, the State Comptroller clearly would be excluded from the definition of "municipal advisor." However, it appears that the State Treasurer and Secretary of Budget and Management would not be excluded even though, by statute, they serve *ex officio* as a result of the offices they hold. Further, each of the State Treasurer and the Secretary of Budget and Management are public officials of the State of Maryland although they are not employees of the System itself. We see no reasonable rationale for the different outcomes under the proposed rules between (1) the State Comptroller (excluded) and the State Treasurer and the Secretary of Budget and Management (each, not excluded), or (2) employees of the System (excluded) and the State Treasurer and the Secretary of Budget and Management (each, not excluded). Persons who serve *ex officio* as a member of the governing body of a "municipal entity," by virtue of their status as an employee or officer of the jurisdiction in which the "municipal entity" is located, should be covered by the exclusion from the definition of "municipal advisor" which now covers the employees of the "municipal entity." In any event, as discussed above, we urge the Commission to exclude all appointed members of a governing body from the definition of "municipal advisor."

We believe that the rules as proposed have unintended consequences for public boards such as the System's Board of Trustees, and for the citizens of states and municipalities, including (1) deterring citizens from serving on public boards, (2) chilling debate, deliberation and advocacy among members of public boards, (3) interfering with the rights of a State and its executive or other appointing body to determine appropriate qualifications for members of governing bodies, (4) unfairly burdening certain public employees with registration and compliance requirements while exempting others from such burdens, and (5) indeed, unfairly burdening any public board member with registration and compliance costs and obligations, and associated liability for potential noncompliance, simply because the board member is fulfilling his or her duty to make decisions and set policy in accordance with responsibilities to manage and administer the business of a public board. These unintended consequences are not aligned with the goals of the Act or the Commission's focus on the orderly regulation of market participants and the protection of investors. We urge the Commission to prevent these unintended and undesirable consequences by making modifications that we have suggested in this letter.

¹¹ The Treasurer, under Maryland law, is a Constitutional officer of the State and is selected by the members of the Maryland legislature. The Secretary of Budget and Management is appointed by Maryland's Governor to service in that position.

We would be pleased to answer any questions or provide further information if requested, regarding the views expressed in this letter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. Dean Kenderdine', with a long horizontal flourish extending to the right.

R. Dean Kenderdine
Executive Director and Secretary to the Board