STRS

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February 18, 2011

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

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

Ladies and Gentlemen:

I am writing on behalf of the New York State Teachers' Retirement System, an instrumentality of the State of New York established and operating pursuant to Article 11 of the New York Education Law. The System provides retirement, disability and death benefits primarily to the teachers and administrators of the New York public primary and secondary schools (outside New York City). The System currently serves over 425,000 active and retired members and their beneficiaries. To pay promised benefits, the System has accumulated over $85 billion in assets. The System is among the 10 largest public employee retirement systems in the United States.

In response to the second full bulleted item on page 51 of the above Release, I am writing to urge respectfully that the Commission not adopt any proposal to somehow treat any members of the governing body of a municipal entity (whether appointed members, elected members or elected officials serving ex officio) as excluded from the term "municipal entity" as that term is used in 15 U.S.C. §78o-4 and, in particular, in 15 U.S.C §78o-4(e)(4)(A) which defines the term "municipal advisor". It is respectfully submitted that any distinctions the Commission proposes to make would not be appropriate and, indeed, would be contrary to the plain sense of the term "municipal entity" as used throughout 15 U.S.C. §78o-4 as amended by section 975 of the Dodd-Frank Act.

This letter will discuss (1) the structure of the System and the role of its governing body; (2) the brief paragraph in the Kutak Rock letter which, based upon pages 40-41 of the above Release, appears to have spawned the above proposal for which comments are now being sought; and (3) the fundamental problems posed by construing the term "municipal entity" in 15 U.S.C. §78o-4 and, in particular, in 15 U.S.C §78o-4(e)(4)(A) in a way which would distinguish between a municipal entity on the one hand and its governing body and/or members of its governing body on the other.

The System

The System has been in operation since 1921. The System is governed by a 10 member Retirement Board. The membership of the Retirement Board is as follows:

- Three active members of the System elected on a rotating basis by an annual convention of active member delegates.
- One retired member elected by a mail vote of retired members.
- Two school administrators appointed by the New York State Commissioner of Education.
- Two present or former school board members, experienced in the fields of finance and investment, elected by the New York State Board of Regents; at least one of these individuals must have experience as an executive of an insurance company.
- One present or former bank executive elected by the New York State Board of Regents.
- The New York State Comptroller or his/her designee.

Board members are elected/appointed to three-year terms (except the State Comptroller or his/her designee) and serve without compensation.

Pursuant to section 504 of the New York Education Law, the Retirement Board is responsible for overseeing the general administration of the System. Pursuant to section 507 of the New York Education Law, the Retirement Board has the authority to appoint a secretary, hire necessary personnel and appoint legal counsel. Pursuant to section 508 of the New York Education Law, the members of the Retirement Board are collectively the trustees of the System's assets and responsible for overseeing their investment. Pursuant to New York Education Law §508(18), the Retirement Board has the authority to delegate the investment of System assets to external investment managers and to the System's professional investment staff. Under regulations promulgated by the New York State Superintendent of Insurance pursuant to section 314 of the New York Insurance Law, the members of the Retirement Board are fiduciaries. The New York State Superintendent of Insurance is authorized to investigate any alleged breaches of that fiduciary duty by Retirement Board members and transmit any findings of breach to the New York State Attorney General and to the appointing authority.

There is no provision of law which authorizes or permits any member of the Retirement Board to act in any way on behalf of the System apart from his/her service collectively with the other members of the Retirement Board (or committee thereof). Generally, no action of the Retirement Board is valid unless it has been approved by a majority vote of the Retirement Board members. In the case of investment transactions, the action must be approved by a majority of the Retirement Board eligible to vote. Meetings of the Retirement Board are subject

to the New York Open Meetings Law and the records of the System are subject to public disclosure to the extent prescribed in the New York Freedom of Information Law.

There is no basis in New York law for postulating that some members of the Retirement Board have different responsibilities or duties as Retirement Board members from those of other Retirement Board members or again that any member of the Retirement Board has any power to act apart from acting collectively with other members of the Retirement Board. There is no basis for positing that some members of the Retirement Board are advisors of other members of the Retirement Board or are any less accountable for their actions than any other members of the Retirement Board. There is no basis for suggesting that some members of the Retirement Board act under some different set of rules than other Retirement Board members.

While the composition of the Retirement Board has been structured to assure that various stakeholders (teachers, school superintendents, school board members, knowledgeable members of the public and the State Comptroller) have representation on the Retirement Board, the duties and responsibilities of Retirement Board members are the same regardless of how they came on the Retirement Board. So far as we are aware, the Retirement Board functions in much the same collective manner as countless other municipal governing bodies across the United States.

The Kutak Rock Letter[1]

The definition of "municipal advisor" in 15 U.S.C. §78o-4(e)(4)(A) added by section 975 of the Dodd-Frank Act excludes from the definition of "municipal advisor" any "municipal entity" or "employee of a municipal entity". Thus, "municipal advisor" is defined by 15 U.S.C. §78o-4(e)(4)(A) in pertinent part as "...a person (who is not a municipal entity or an employee of a municipal entity)..." In our view, and as discussed further below, a straightforward understanding of the term "municipal entity" as used in the foregoing language would include the governing body of the municipal entity and the members of that governing body. Indeed, as discussed below, reading the term "municipal entity" as not including the governing body of the municipal entity and/or its members would effectively eviscerate 15 U.S.C. §78o-4 as amended by section 975 of the Dodd-Frank Act.

Nonetheless, the first full paragraph on the second page of the Kutak Rock letter under the heading "Board Members" appears to inquire about the above language of 15 U.S.C. §78o-4(e)(4)(A) and in particular whether members of the governing body of a municipal entity might be considered "municipal advisors". Without any analysis whatever, the letter assumes the language "...does not automatically exclude a person who serves on the governing body of a municipal entity..." The letter further assumes without any analysis that a determination whether a person serving on the governing body of a municipal entity might be a "municipal advisor" must be based a construction of the phrase "an employee of a municipal entity". Reasoning that members of a governing board cannot be considered "employees of a municipal entity", the letter draws the conclusion that members of the governing board of a municipal entity might be required to register as municipal advisors unless the Commission were to

[1] We are referring to the letter identified in footnote 87 of Release No. 34-63576 and referenced in footnotes 140 and 141 to the discussion on pages 40-41 of the release. We note the letter does not purport to have been written on behalf of any municipal entity or any governing body of any municipal entity.

interpret the phrase "employee of a municipal entity" so as to exclude such members. The letter provides no explanation of why it might be appropriate to consider the legal status of the governing body of a municipal entity apart from the municipal entity in this context or further why it is appropriate to consider the status of individual members of a governing body separately and apart from the governing body of which they are a part and on which they serve.

In our view, the subject paragraph of the Kutak Rock letter was simply mistaken. As discussed more fully below, by incorrectly focusing on the phrase "employee of a municipal entity" and completely ignoring the term "municipal entity" immediately preceding it, the letter asked the wrong question and, in due course, came to the wrong conclusion.[2]

The Term "Municipal Entity" As Used in 15 U.S.C. §78o-4

Whenever the term "municipal entity" appears in 15 U.S.C. §78o-4 as amended by section 975 of the Dodd-Frank Act, it seems abundantly clear Congress intended the term to include the governing body of municipal entities and the members of those governing bodies.

For example, 15 U.S.C. §78o-4(a)(1)(B) added by section 975 of the Dodd-Frank Act provides:

> It shall be unlawful for a municipal advisor **to provide advice to or on behalf of a municipal entity** or obligated person with respect to municipal financial products or the issuance of municipal securities, or **to undertake a solicitation of a municipal entity** or obligated person, unless the municipal advisor is registered in accordance with this subsection. (Emphasis added)

Language added by section 975 of the Dodd-Frank Act to 15 U.S.C. §78o-4(c)(1) provides:

> [N]o broker, dealer, municipal securities dealer, or municipal advisor shall make use of the mails or any means or instrumentality of interstate commerce **to provide advice to or on behalf of a municipal entity** or obligated person with respect to municipal financial products, the issuance of municipal securities, or **to undertake a solicitation of a municipal entity** or obligated person, in contravention of any rule of the Board. A municipal advisor and any person associated with such municipal advisor **shall be deemed to have a fiduciary duty to any municipal entity** for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or

[2] Presumably due to the pressure of time, Commission staff appears to have accepted the assumption of the Kutak Rock letter that the appropriate question is whether members of the governing body of a municipal entity are to be considered "employees of a municipal entity" for the purposes of the language of 15 U.S.C. §78o-4(e)(4)(A) under discussion. Proceeding to respond to that question, staff sought to draw a distinction between members of a governing body who are appointed to the body on the one hand and members who are elected to the body or who are serving ex officio on the other. Unfortunately, staff does not appear to have had occasion to consider the import of the term "municipal entity" immediately preceding the phrase "employee of a municipal entity" in interpreting the language of 15 U.S.C. §78o-4(e)(4)(A) under discussion.

> course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board. (Emphasis added)

There is absolutely no reason to question that the term "municipal entity" as used in the above provisions (and as used throughout 15 U.S.C. §78o-4 as amended by section 975 of the Dodd-Frank Act) includes both the governing body of a municipal entity and its members. Simply put, if the governing body of a municipal entity and its members are not part and parcel of the term "municipal entity" as used in those provision, then any third party providing advice to the governing body and/or its members or soliciting the governing body and/or its members would not be subject to these provisions. Plainly it was not Congress' intent to create a distinction for these purposes between a disembodied municipal entity on the one hand and the flesh and blood governing body of the municipal entity and its members on the other.[3]

Given that the term "municipal entity" as used in 15 U.S.C. §78o-4 as amended by section 975 of the Dodd-Frank Act must include the governing board of the municipal entity and the members of the governing board, there is every reason to conclude that the governing body of a municipal entity and its members are included in the term "municipal entity" as that term is used in the subject language of 15 USC §78o-4(e)(4)(A).

We respectfully submit beginning the analysis at the right starting place avoids all the problems spawned by the incorrect reasoning in the Kutak Rock letter which begins by assuming the matter rests entirely on a construction and interpretation of the phrase "employee of a municipal entity" while ignoring the term "municipal entity" immediately preceding it. The first problem is that it posits consideration of individual members of a governing body separate and apart from the governing body on which they serve. Members of municipal governing bodies generally do not, as members of the body, have any authority or power to act separate and apart from the body on which they serve. The body acts collectively. No explanation is provided in the Kutak Rock letter as to how the members of Congress might have found their way to ignoring the collective nature of municipal governing bodies. The second problem is the incorrect analysis leads, as has occurred, to attempts to draw purported distinctions between and among members of a municipal governing body, even though they have exactly the same roles and responsibilities when serving on the municipal governing body.

The attempted distinctions between appointed members and elected members or members serving ex officio advanced to date make no reasoned connection to the language of the underlying statute or its purposes, or for that matter to the way in which governing bodies typically work in real life.[4] Indeed, with respect to the posited distinction based upon "accountability", while the remedies and sanctions for corruption or malfeasance in office may vary somewhat from municipality to municipality, there are typically a number of ways in which

[3] We would assume the Commission would reject out of hand any argument that someone was not advising or soliciting the "municipal entity" because the person was only advising or soliciting the governing body of the municipal entity and/or the members of its governing body.

[4] For example, one could make the exact opposite argument to the one made on page 41 of Release No. 34-63576 that entrenched elected members have the ability to hang on no matter what they did at least until the next election, which may be years away, while appointed members are typically forced out of office very quickly once their misdeeds come to light.

members of a governing body can be held accountable regardless of how they came on the governing body. We respectfully submit it would be inappropriate for the Commission to embark upon an attempt to draw distinctions between and among hundreds of thousands of members of the governing bodies of the hundreds of thousands of municipal entities across the United States in order to come up some conclusion to the question mistakenly posed by the Kutak Rock letter. We respectfully submit the Commission can skip all that and instead rely upon the plain import of the term "municipal entity" as used in 15 USC §78o-4(e)(4)(A) as well as elsewhere in 15 U.S.C. §78o-4.

Conclusion

For the reasons stated above, we respectfully submit the Commission not adopt any proposal which would treat the governing bodies of municipal entities and/or their members, whether elected, appointed or otherwise, acting within the scope of their duties as "municipal advisors" under 15 USC §78o-4(e)(4)(A), inasmuch as they are part and parcel of the term "municipal entity" as that term is used in that provision and elsewhere in 15 U.S.C. §78o-4 and, therefore, not "municipal advisors" under the plain language of 15 USC §78o-4(e)(4)(A).

Respectfully submitted,

Wayne Schneider
General Counsel