



February 17, 2011

Attn: Elizabeth Murphy, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549

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

CITY OF FRESNO  
FIRE & POLICE BOARD

PAUL CLIBY, CHAIR

OSCAR WILLIAMS, VICE CHAIR

JOEL ARANAZ

JERRY DYER

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CITY OF FRESNO  
EMPLOYEES BOARD

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JEFF BEATTY

JOE GRAY

RANDY NASON

RETIREMENT  
ADMINISTRATOR

STANLEY L. MCDIVITT

Dear Chairman Schapiro and Members of the Commission,

Thank you for the opportunity to comment on the regulations proposed in Securities Release No. 34-63576 (the "Release") for the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). We are specifically responding to the second full bulleted item on page 51 of the above Release.

We are writing to urge respectfully that the Commission not adopt its proposal to treat appointed members of the governing body of a public retirement system as municipal advisors. It is unwise public policy and a questionable exercise of rule-making authority to classify any members of public retirement boards as municipal advisors because:

- Members of public retirement boards receive, not provide, investment advice in fulfilling their duties as fiduciaries;
- Public retirement boards are the intended beneficiaries, not the objects, of the protections offered by the Dodd-Frank Act;
- Members of public retirement boards are already accountable to numerous system stakeholders;
- Members of public retirement boards are already subject as fiduciaries to the terms of the pension plans they administer and to numerous state and local regulations;
- Classifying members of public retirement boards as municipal advisors would unnecessarily restrict the pool of qualified volunteers for service on the boards.

Finally, we request that the Commission clarify the definition of "employee of the municipal entity" for the purposes of the exclusion from the definition of municipal advisor so that appointed board members who are employees of the plan sponsor come within the exclusion.

### Background to the City of Fresno Retirement Systems

The undersigned serve as the chairs, respectively, of the City of Fresno Employees Retirement Board which administers the City of Fresno Employees Retirement System (the "Employees System") and the City of Fresno Fire and Police Retirement Board which administers the City of Fresno Fire and Police Retirement System (the "Fire and Police System") (collectively, the "Fresno Systems"). The Fresno Systems are public defined benefit retirement plans, established under the City of Fresno Charter and the Fresno Municipal Code. Participation in the Employees System, which has approximately 2,283 participants, is mandatory for permanent, full-time, non-safety employees of the City of Fresno. Participation in the Fire and Police System, which has approximately 1,135 participants, is mandatory for all sworn City of Fresno fire and police personnel.

The funds of the Fresno Systems are commingled for investment purposes and are administered jointly by the Retirement Boards. City employees make pre-tax contributions to the Fresno Systems. The City makes contributions to the Fresno Systems on behalf of employees based on an independent actuary's determination of the amount required annually to fund the Plan's liabilities in an actuarially sound manner. Contributions are used only for the purpose of funding the vested and unvested liabilities of the Plan.

Per Section 910 of the City of Fresno Charter, each of the Fresno Systems is administered by a five (5) member Retirement Board. The Retirement Boards meets together once a month. Per Section 3-505 of Article 5 of the Fresno Municipal Code, the Retirement Board for the Employees System is composed of two members elected by employees, two city management employees appointed by the Mayor and approved by the City Council, and one member elected by the other four members of the Retirement Board. Per Section 3-305 of the Fresno Municipal Code, the Retirement Board for the Fire and Police System is composed of one member elected by fire personnel, one member elected by police personnel, two city management employees appointed by the Mayor and approved by the City Council, and one member elected by the other four members of the Retirement Board. The Retirement Boards jointly appoint a Retirement Administrator to administer the retirement office and its financial affairs, hire and remove retirement office staff, and to perform other administrative duties. The Retirement Administrator also serves as the Secretary of the Joint Board.

During the meetings of the Retirement Boards, each of which are subject California's open meeting law, each member of the Retirement Boards expresses his or her opinion, makes comments, discusses proposed actions and votes on matters before the Retirement Board. The Retirement Boards retain independent outside consultants, such as investment managers, investment consultants, actuaries, and attorneys. During their open meetings the members of the Retirement Boards routinely and customarily ask questions of these consultants, and rely on their professional advice and reports.

### Comments

Under the Commission's interpretation of the statutory definitions of "municipal entity" and "municipal advisor" set forth in the Release, each of the Fresno Systems will constitute a "municipal entity" for the purposes of the Dodd-Frank Act, and appointed members of the Retirement Boards will be required to register with the Commission as "municipal advisors."

We respectfully disagree with the Commission's interpretation of the definitions of "municipal entity" and "municipal advisor," and request that the Commission revise the regulations proposed in the Release for the following reasons:

1. It is Unwise Public Policy and a Questionable Exercise of Rule-Making Authority to Include Public Retirement Plans Within the Definition of Municipal Entity.

In the Release the Commission interprets the definition of "municipal entity" to include public pension funds. We respectfully contend that Congress did not intend to include public retirement plans within the definition of "municipal entity." The definition, found at Section 15B(e)(8)(B) of the Securities Act, states that a municipal entity is any "plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof..." Congress, however, qualified Section 15B(e)(8)(B) with the following subsection (C) which reads "*or any other issuer of municipal securities.*" This statutory language makes it clear that the legislative intent was that the definition of "municipal entity" only apply to state plans, programs, or asset pools which *also issue municipal bonds or other securities*. The Retirement Boards do not issue securities of any type.

Further, the legislative history of Section 15B of the Securities Act indicates that it was enacted by Congress as part of the Security Acts Amendments of 1975 (the "1975 Amendments") to "create a federal mechanism for the regulation of transactions in [municipal securities] and brokers and dealers and banks in a municipal securities business."<sup>1</sup> Prior to 1975, most of the conduct of municipal securities *professionals* was unregulated because municipal securities were included in the definition of "exempted security" under the pre-1975 version of Section 3(a)(12) of the Securities Act. The Senate Banking, Housing and Urban Affairs Committee described the situation prior to the 1975 Amendments as a "disturbing pattern of *professional* misconduct" that was "characterized by unconscionable mark-ups, churning of customer accounts, misrepresentations concerning the value of municipal securities, disregard of suitability standards, and scandalous high-pressure techniques."<sup>2</sup> (Emphasis added)

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<sup>1</sup> See S.Rep. No. 75, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3 at 42-43, 1975 U.S. Code Cong. & Admin.News at 182.

<sup>2</sup> See S.Rep. No. 75, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3 at 43, 1975 U.S. Code Cong. & Admin.News at 221.

Public pension boards *which do not issue securities* are not *professionals, brokers or dealers*, and therefore *can not* engage in the activities which Section 15B is intended to regulate.

The legislative history of Section 15B of the Securities Act, when combined with the language of Section 15B, make it clear that public pension funds, local government investment pools and other state and local entities or funds, along with participant-directed investment programs or plans such as Internal Revenue Code Section 529, 403(b) and 457 plans *which do not issue securities*, are the intended *beneficiaries* of the protections afforded by Section 15B of the Securities Act.

2. It is Unwise Public Policy and A Questionable Exercise of Rule-Making Authority to Classify Any Members of Public Retirement Boards as Municipal Advisors because they Receive, Not Provide, Investment Advice in Fulfilling their Duties as Fiduciaries.

Six of the eight members of the Retirement Boards are full-time employees of the City of Fresno (two of the six serve on both boards), and their job responsibilities are separate and distinct from the tasks they perform in their roles as members of the Retirement Boards. The remaining two members are civic minded citizen volunteers. Members of the Retirement Boards do not hold themselves out as having professional or special expertise in “municipal financial products” or “municipal securities,” nor is it expected or required that appointed or elected members of the Retirement Boards have the knowledge, experience, and competence required to provide the type of advice contemplated by the Dodd-Frank Act. Therefore it is necessary as a matter of fiduciary duty for the Retirement Boards to hire independent investment managers, investment consultants, actuaries, and attorneys to prepare analyses and report at the regularly scheduled monthly meetings. Per Section 3-305 and Section 3-505 of the Fresno Municipal Code, the Retirement Boards:

“...employ a consulting actuary, who shall be a person skilled by training and experience, in both the technical and administrative features of retirements systems. The Board may employ or contract for professional or accounting services, including legal services, to carry out and effect the functions of the Board.”

The Retirement Boards possess a fiduciary duty to manage the investment of the funds of the Fresno Systems. During the monthly meetings of the Retirement Boards, Board members do not make discrete and discretionary decisions in regard to selecting particular and specific investments. Instead, the Boards make high-level decisions regarding the selection of professional investment managers, asset allocation, and other investment decisions pursuant to requirements of a pre-established investment policy.

Members of the Retirement Boards function as legislative or policy decision makers who *rely on, receive, and implement* the advice provided by the independent and professional consultants hired by the Retirement Boards. Appointed members of the Retirement

Boards fail to satisfy the definition of “municipal advisor” on its face because they are *recipients* of investment, actuarial, and legal advice, and not the *providers* of such advice.

3. It is Unwise Public Policy and a Questionable Exercise of Rule-Making Authority to Classify Any Members of Public Retirement Boards as Municipal Advisors Because Members of Public Retirement Boards are the Intended Beneficiaries of the Protections Offered by the Dodd-Frank Act.

As we detailed under Item 1 above, Section 15B of the Securities Act was added by the 1975 Amendments to regulate the conduct of *professionals* engaged the business of municipal securities.

Individuals who sit on the retirement boards of public pension funds, local government pools and other state and local entities or funds, along with participant-directed investment programs or plans (Code Section 529, 403(b) and 457 plans) are not *professionals, brokers or dealers*. Members of public retirement boards *receive* advice from professional and therefore do *not* engage in the activities which Section 15B is intended to regulate.

The legislative history of Section 15B of the Securities Act, when combined with the plain meaning of “municipal advisor,” makes it clear that public pension plans and the pension boards which administer them are the intended *beneficiaries* of the protections afforded by Section 15B of the Securities Act. The Commission’s interpretation of the definition of “municipal advisor” should therefore be clarified to state that a “municipal advisor” is an individual who holds himself or herself out as having professional capacity, special knowledge, and expertise in municipal financial and securities matters, and whose advice is expected to and is likely to be relied and acted upon by those who make policy decisions on behalf of a governing body.

4. It is Unwise Public Policy and a Questionable Exercise of Rule-Making Authority to Classify Appointed Members of Public Retirement Boards as Municipal Advisors Because They Are Already Accountable to Numerous System Stakeholders.

It is very important to view accountability issues from the day-to-day perspective of how public retirement boards, such as the Retirement Boards, in fact operate. The members of the Retirement Boards, as well as all California public retirement boards, are subject to an extensive and evolving mosaic of concrete oversight and accountability. Public retirement boards, such as the Retirement Boards, are subject to keen and on-going employee scrutiny; plan sponsor scrutiny; scrutiny by taxpayers; and scrutiny by the local press. Civil grand juries can and have been convened to review the workings and operations of public retirement boards, such as the Retirement Boards. Board meetings are open; agendas of the time and place of the meetings must be posted in advance of the meetings as a matter of state law; and members of the public, including members of the press and members of the employee organizations that represent plan participants, can easily attend the Boards’ open meetings.

5. It is Unwise Public Policy and A Questionable Exercise of Rule-Making Authority to Classify Appointed Members of Public Retirement Boards as Municipal Advisors Because They Are Already Subject as Fiduciaries to the Terms of the Plan and to Numerous State and Local Regulations.

In addition to the fiduciary and general trust responsibilities imposed by the Fresno Municipal Code and City of Fresno Charter, Retirement Board members are also subject to an extensive array of state laws:

- The California Pension Protection Act (California Constitution, Article 16, Section 17). This provision of the California Constitution was enacted by the people of California through the initiative process in 1992 and imposes a strict set of fiduciary duties and requirements upon public retirement boards. California public retirement boards as a matter of constitutional mandate are thus required to administer the retirement plan solely in the interest of plan members, retirees, and beneficiaries. The Act also imposes upon board members ERISA's prudent person standard.
- The Ralph M. Brown Act (California Government Code 54950, et. seq.). The Brown Act requires open public meetings, pre-published meeting agendas, published minutes, and public participation. Violations of the Brown Act are punishable by criminal penalties and civil remedies.
- California Government Code Section 1090 ("Section 1090"). Section 1090 prohibits a board member from being involved in a contract in which the member has a financial interest. California courts for decades have liberally interpreted the provisions of Section 1090. If the member is found to have willfully violated GC Section 1090, he or she can be criminally prosecuted. See, for example, *Lexin v. Sup. Ct. 47 Cal. 4<sup>th</sup> 1050*.
- The California Public Records Act. The Public Records Act gives the public access to all communications related to public business in the possession of public agencies, such as the Retirement Boards. Individuals denied access to public information may sue to enforce their rights to the information and, if successful, can recover their costs and legal fees.
- The California Political Reform Act. The Political Reform Act requires board members to publicly disclose their private economic interests and requires board members to disqualify themselves from participating in decisions in which they have a financial interest. The Political Reform Act also limits or prohibits the receipt of specified gifts and honoraria.

As can be seen, it would be incorrect to suggest that the appointed members of the Retirement Boards are not directly accountable to the participants in the plan and municipality simply because they have not been elected. Members appointed to the Retirement Boards are thus subjected to significant deterrence to misconduct in the form of state ethics and other laws and common law responsibilities which include potential financial and criminal penalties. Each of these statutory controls satisfies the Commission's stated intent of protecting the public.

6. It is Unwise Public Policy and a Questionable Exercise of Rule-Making Authority to Classify Appointed Members of Public Retirement Boards as Municipal Advisors Because to do so Would Unnecessarily Restrict the Pool of Qualified Volunteers for Service on the Boards.

The personal cost and burden of complying with the registration requirements of the Dodd-Frank Act as interpreted in the Release will be onerous for appointed members of the Retirement Boards. Having to register at all, much less with the both SEC and the MSRB, is at best counterproductive.

For example, Form MA-1, the municipal advisor registration form, is nearly 30 pages long and appears to require the assistance of an attorney or other individual with extensive experience in federal securities law to complete. In addition, Form MA-1 requires the registrant to provide a significant amount of personal information which will be made available to the public. Appointed members of the Retirement Boards will be personally responsible for costs of completing Form MA-1, as well as for the costs complying with the other registration requirements, because they serve voluntarily on the Retirement Boards are prohibited from receiving compensation for service on the Retirement Boards by Section 3-505 and 3-305 of the Fresno Municipal Code.

In addition, the MSRB currently charges an initial fee of \$100 to register, and a \$500 annual fee thereafter. Again, these costs will have to be paid by the individual members of the Retirement Boards.

Unless board members who are appointed from the ranks of city management or who are appointed from the ranks of civic-minded citizens are excluded from the definition of municipal advisors, the burdens of complying with the registration requirements, and exposure to federal liability in addition to state liability will act as a very significant disincentive to serve on the Retirement Boards.

7. It is Important to Clarify in the Final Rule that the Following Individuals Who Sit on A Public Retirement Board Come Within the Exclusion for "Employees of Municipal Entity": (1) Employees of the Municipal Entity Which Sponsors the Pension Plan; (2) Employees of the Municipal Entity Which Sponsors the Pension Plan Who Are Appointed by the Employer or Appointed by the Unions Representing Employees of the Employer ; and (3) Employees of a Union That Represents Employees of the Municipal Entity and Who Are Appointed by the Union.

We note that Section 925 of the Release states that "an employee of a municipal entity" will not be a "municipal advisor." Neither the Dodd-Frank Act nor the Release clarify whether the exclusion applies to (1) employees of the municipal entity; (2) employees of the municipal entity who are appointed by the municipal entity or appointed by the

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unions representing employees of the municipal entity; or (3) employees of a union that represents employees of the municipal entity and who are appointed by the union. As noted above, each member of the Retirement Boards an employee of the City of Fresno.

There should be no distinction made between members of the Retirement Boards, regardless of whether they are appointed by the Mayor or their respective union, and regardless of whether they are appointed or elected, as each member of the Retirement Boards is subject to the same stakeholder scrutiny and to the same state laws, and shares the same fiduciary duty to the Fresno Systems and the same mandate to act exclusively in the interest of the participants in the Fresno Systems. Imposing a system which subjects some members of the Retirement Boards to increased compliance requirements and liability will undermine the ability of the Retirement Boards to carry out the responsibilities assigned to them by the terms of the Fresno Systems.

#### Conclusion

We support the Commission's effort to improve the quality of financial advice provided to municipal entities and their pension plan boards, and the ethics and qualifications of the individuals providing such advice through its implementation of the Dodd-Frank Act. However, including appointed members of public pension plan boards in the definition of "municipal advisor" will not advance the Commission's objectives. Appointed members of public retirement boards simply do not have the professional knowledge or expertise to provide the advice contemplated by the Dodd-Frank Act. Further, they do not provide advice – they receive it. Appointed members are already subjected to potential financial and criminal liability under state law. Finally, the additional time, expense, disclosure, recordkeeping, and exposure to potential liability under the Dodd-Frank Act will make it increasingly difficult to recruit qualified individuals to serve as members of the Retirement Boards.

We welcome any questions you may have regarding my comments.

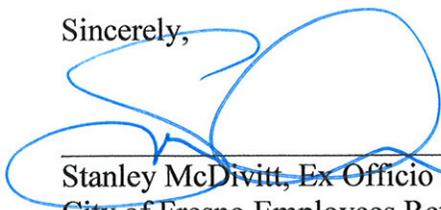
Sincerely,



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Paul Cliby, Chair  
City of Fresno Fire and Police Retirement Board

Sincerely,



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Stanley McDivitt, Ex Officio Secretary  
City of Fresno Employees Retirement Board