



# STEPHEN F. AUSTIN STATE UNIVERSITY

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February 21, 2011

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

Re: File Number S7-45-10

Dear Secretary Murphy:

Stephen F. Austin State University respectfully submits these comments to the proposed final rules pertaining to the registration of municipal advisors. The university acknowledges and respects the concerns of the Securities and Exchange Commission (“SEC”) regarding public accountability, however the SEC misinterprets the role and relationship of the university’s appointed board and has not recognized in its comments the numerous, and already present, laws and regulations that make appointed board members accountable to the university and the public for their actions. Furthermore, the proposed rules will have a drastic detrimental effect on the university as the number of those willing to voluntarily serve as board members is diminished.

On December 20, 2010, the SEC released proposed final rules regarding the registration of municipal advisors. These rules 15Ba1-7 through 15Ba1-7, found in Release No. 34-63576 (the “SEC Release”) <sup>1</sup>, are in response to the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), Pub. L. No. 111-203, 124 Stat. 1376 (2010), which amended Section 15B of the Securities Exchange Act of 1934 (the “Act”), 15 U.S.C. § 78a et. seq.. Section 15B(a)(1) of the Act, as amended, makes it unlawful for a “municipal advisor” to provide advice to or on behalf of a municipal entity unless the municipal advisor has first registered with the SEC. The term “municipal advisor” means:

“a person (who is not a municipal entity or an employee of a municipal entity) that – (i) 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 (ii) undertakes a solicitation of a municipal entity.”

15 U.S.C. § 78o-4(e)(4).

The term excludes employees of a municipal entity. *Id.* at § 78o-4(e)(4)(A). In its discussion of whom is to be considered an employee, the SEC provides that employees of a municipal entity “should include any person serving as an elected member of the governing body of the municipal entity to the extent that person is acting within the scope of his or her role as an elected member of the governing body of the municipal entity.” The SEC does not believe that appointed

<sup>1</sup> S.E.C. Release No. 34-63576: File No. S7-45-10 (Dec. 20, 2010). 76 Fed. Reg. 824 (Jan. 6, 2011).

members of a governing body of a municipal entity that are not elected ex officio members should be excluded from the definition of “municipal advisor”. The reasoning for this distinction is that, in the SEC’s opinion, employees and elected members are accountable to the municipal entity for their actions, but appointed members are not directly accountable for their performance to the citizens of the municipal entity. S.E.C. Release at 40-41.

Stephen F. Austin State University (“SFASU”) is a public institution of higher education located in Nacogdoches, Texas. The control and management of the university is vested in a board of nine regents, appointed by the Governor of Texas, subject to confirmation by the State Senate. Tex. Educ. Code § 101.11. The Governor further appoints one non-voting student regent each year. The Board of Regents (the “Board”) is responsible for enacting all bylaws, rules, and regulations necessary for the university to operate. *Id.* at 101.15. Without such rules, the university cannot operate. As such, the Board members are neither employees in the traditional sense, nor advisors of the university, but rather the statutory embodiment of the university itself as its decision-makers. As the university is a separate legal entity of the State of Texas, Board members are the “municipal entity”, defined under law as:

“[a]ny State, political subdivision of a State, or municipal corporate instrumentality of the State, including – (A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) 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; and (C) any other issuer of municipal securities.” 15 U.S.C. § 78o-4(e)(8).

The Board functions as the “agency, authority, or instrumentality of the State”.

Furthermore, as the Board is the decision-making body and constitutes SFASU itself, it cannot therefore provide “advice to or on behalf of a municipal entity”. *Id.* at § 78o-4(e)(4). The Board cannot give advice to or on behalf of itself. It is the advisee, not the advisor. When considering an issue before the Board, each individual member deliberates and votes for decisions that are made as a collective governing body. Only actions approved by a majority of the members in a properly called meeting under state law are valid. Through the course of the deliberations amongst the members of the Board, no individual Board member renders “advice”. Rather, each individual Board member reviews the information that has been submitted, including any advice rendered by an external party, and determines his/her individual decision on how to vote. There may be discussion amongst the Board members on a particular item, however such deliberation is not advice as that term is intended. The votes are then tallied and the majority decision is the action of the Board, and thus SFASU, on that issue. Therefore, a Board member is not offering advice to SFASU, but rather making the decision itself after considering advice provided to him/her.

The SEC Release fails to acknowledge the extensive statutory scheme that provides for the public accountability of the Board, and instead imposes a distinction between elected and appointed officials that is unnecessary. As previously stated, Board members are appointed by the Governor only after a stringent application and appointment process. If appointed by the Governor, a Board member must still be approved by the State Senate, an elected public body. If confirmed by the Senate, the Board member must take the oath of office, and upon doing so, becomes subject to the numerous laws governing conduct and public accountability of state

officers. These are the same laws that all elected officials must adhere to. All meetings are open to the public in accordance with the Texas Open Meetings Act (the “OMA”). Under the OMA, “every regular, special, or called meeting of a governmental body shall be open to the public.” Tex. Gov’t Code § 551.002. The Board is not permitted to take any action without having properly called a meeting in accordance with the OMA. Actions taken in violation of this requirement are voidable and may subject individual Board members to criminal sanctions. *Id.* at 551.141, .143-.146. At these meetings, the Board through its Rules and Regulations permits members of the public to directly address the Board on agenda items. Additionally, Board members govern subject to the Texas Public Information Act, which specifically provides that “[u]nder the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of [Texas] that each person is entitled...at all times to complete information about the affairs of government and the official acts of public officials and employees”. *Id.* at 552.001. This includes providing complete and accurate minutes of its meetings. Tex. Educ. Code § 101.17. Under these open government provisions, the Board is constantly subject to public scrutiny, whether through a meeting or written document. This level of scrutiny is not shared by other, non-public official “municipal advisors”. Both appointed and elected officials must adhere to these same mechanisms of public accountability.

In addition, appointed Board members are held accountable by law for honest and ethical conduct. These laws already provide the regulation that the SEC seeks to achieve with its proposed rules. State law provides “that a state officer or state employee may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer’s or employee’s duties in the public interest.” Tex. Gov’t Code § 572.001. Specifically, Board members are required to file financial statements consisting of a list of all sources of occupational income, the number of shares of stock of any business entity held, acquired or sold, a list of all bonds and commercial paper held or acquired, any interest and dividend income, any trust income, a list of all boards of directors memberships or executive positions held, and others. Such financial statements must disclose this information for the Board member and his/her spouse and dependent children. This document is filed on an annual basis and is open to the public. Failure to file may result in both civil and criminal penalties. *Id.* at 572.023, .026, .032-34. Once again, both appointed and elected officials must adhere to this same mechanism of public accountability.

Appointed Board members are also subject to stringent standards of conduct and ethics. For example, a Board member is prohibited from accepting or soliciting any gift or service that might reasonably tend to influence independent judgment or from accepting any such items for exercising his/her official duties. Conflicts of interest are to be strictly avoided. Board members are held publicly accountable for any violations of the State ethics rules through potential civil or criminal liability and removal from office by a court or jury. *Id.* at 572.051, .058. As with the open government provisions and the submittal of financial statements, both appointed and elected officials are subject to this provision.

The SFASU Board is comprised of citizen volunteers. These individuals volunteer their time and expertise in order to serve their State. Many members must travel hundreds of miles in

order to perform their duty to the university. They do this even though they subject themselves to public scrutiny and potential legal liability. The difficult decisions they make and opinions they express have adverse consequences on their personal reputations and professional lives. Although they are granted protection from suit, such immunity is not absolute and even being named in a lawsuit imposes a personal burden. As illustrated above, these volunteers subject themselves to additional laws and regulations which force them to broadcast to the immense population of the State of Texas very personal facts about their finances and relationships. To make the decision to serve as a board member already requires great personal sacrifice. The SEC's proposed rule and interpretation will only provide additional hardship on these citizen volunteers. This additional federal regulation, increased fiduciary duty, and additional monetary costs will result in the loss of willing citizens and valuable expertise to the Board of the university. The detriment that will be suffered by SFASU by the loss of these leaders and their expertise, experience, and willingness to serve far exceeds any benefit of requiring these appointed board members to register with the SEC.

SFASU hereby requests that the SEC not impose an unnecessary additional burden on appointed board members and revise its interpretation so that appointed board members, like elected board members, are included in the exception for "employees of a municipal entity" under the definition of "municipal advisor". Alternatively, SFASU requests that the SEC recognize that some appointed boards, like that at SFASU, embody the agency, authority or instrumentality of the State and are therefore a "municipal entity" and excepted from the definition of "municipal advisor". The Board is not able to "advise" as required to fall under the definition of "municipal advisor". The concern of the SEC regarding accountability to the university and the public is completely alleviated by the extensive legal framework that State law provides. The proposed rule will only serve to deplete the limited number of individuals willing to serve in this voluntary capacity without providing any benefit that is not already provided for under existing laws and regulations.

Sincerely,

A handwritten signature in black ink that reads "Baker Pattillo". The signature is written in a cursive, flowing style.

Baker Pattillo  
President