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Via Electronic Mail

February 22, 2011

Mary L. Schapiro
Chairman
Securities and Exchange Commission
100 "F" Street, NE
Washington, DC 20549-1090

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

Re: S.E.C. Release No. 34-63576: File No. S7-45-10

Dear Chairman Schapiro and Secretary Murphy:

The Securities and Exchange Commission (SEC) announced proposed new rules 15Ba1-1 through 15Ba1-7 (collectively, the Rule) and published them in the *Federal Register* on January 6, 2011. The proposed Rule was issued in response to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act), particularly the amendment of Section 15B of the Securities Exchange Act of 1934 requiring "municipal advisors" to register with the SEC and making it unlawful for an unregistered municipal advisor to perform municipal advisory activities. The Rule provides an expansive definition of "municipal advisor," treating all appointed members of governing bodies of municipal entities, including agencies of State governments, as municipal advisors.

I serve as Chairman of the Texas Higher Education Coordinating Board and write to express my serious concern over the scope of the proposed Rule. It could be interpreted to include all members of that Board, as well as all governing board members of Texas public colleges and universities and university systems, given the expansive definition of "municipal advisor." I believe that the proposed Rule is an overly broad interpretation of the Act and respectfully request that you refrain from implementing the proposed definition of "municipal advisor" to the extent that it would require citizen volunteers to register as municipal advisors. I will provide background and outline the reasons underpinning my request.

Background

The Texas Higher Education Coordinating Board was established by the Governor of Texas and the Texas Legislature nearly five decades ago as an agency to provide leadership and coordination for the Texas higher education systems, institutions, and governing boards, in an effort to ensure that Texas achieve excellence in higher education. It represents the highest authority in the state in matters of public higher education. The Board is charged with overseeing the efficient and effective utilization of available resources and the elimination of costly duplication in program offerings, faculties, and physical plants. The Board's higher education responsibilities and authority, for example, span the spectrum from approval of construction projects to student financial aid to establishment and maintenance of a management information system that includes statistical information appropriate to planning, financing, and decision-making for all areas of higher education.

By law, the Board consists of nine voting members appointed by the Governor so as to provide representation from all areas of the State with each member being a representative of the general public. One non-voting student member is also appointed by the Governor. The Governor also appoints the Chairman and Vice Chairman of the Board from among the nine voting members. The Board members are not compensated for their service but do receive basic expense reimbursement. Voting members of the Texas Higher Education Coordinating Board must be confirmed by the Senate. Both the Governor and the Senators are elected directly by the people of Texas.

Many potential conflict of interest situations have been precluded by Texas's statutory use of a preventive approach to problem solving. For example, a Board member may not be employed for remuneration in the field of education during the member's term of office. Chapter 61 of the Texas Education Code places a number of other restrictions on appointments to the Texas Higher Education Coordinating Board and thereby operates by disqualifying any person with certain interests from ever serving as a State officer of the agency.

The Board, by law, is directed to inform the Legislature on matters pertaining to higher education, and must report to the Legislature not later than January 1 of each odd-numbered year concerning the state of higher education in Texas. In that biennial report, the Board must assess the state's progress in meeting the goals stated in the statutory plan for higher education, must include analyses performed in conjunction with the board's periodic review, and must recommend any Legislative action it deems appropriate to assist the State in meeting those goals. The Board is required to file an annual average of more than 50 reports with the Governor and Legislature to assist them in maintaining currency in higher education. In addition, the Board responds to thousands of data requests and requests for information from the Governor, the Legislature, and the general public on an annual basis.

Analysis

I suggest that the proposed Rule interprets the Act more broadly than contemplated, or necessary, to implement Congressional intent. The Act defines “municipal advisor” as a person (who is not a municipal entity or an employee of a municipal entity) that provides advice to or on behalf of a municipal entity....” 15 U.S.C. § 78o-4(e)(4). No analysis was set forth as to whether a governing board member “provides advice” or constitutes a “municipal entity.” Nonetheless, and seemingly contrary to the SEC’s longstanding interpretation of “advisor,” the SEC Release concludes: “The Commission does not believe that appointed members of a governing body of a municipal entity that are not elected *ex officio* members should be excluded from the definition of a ‘municipal advisor.’” The SEC further concluded that it “is concerned that appointed members, unlike elected officials and elected *ex officio* members, are not directly accountable for their performance to the citizens of the municipality.”

The Commission requested input on whether the distinction between elected and appointed members is appropriate. In my view, the distinction is inappropriate. I shall discuss my reasons *seriatim*.

First, municipal entities are explicitly excluded from the definition of municipal advisors. Curiously, the SEC Release did not mention this exception when it concluded that the appointed members of the governing board of a municipal entity should not be excluded from the definition of municipal advisor. The governing board of a municipal entity such as the Texas Higher Education Coordinating Board *is* the municipal entity. By statute, the Board is to be responsive to its stakeholders. By statute, the Board need only employ a Commissioner of Higher Education, an Internal Auditor, and a General Counsel. It could, if it so chose, subcontract the agency’s work rather than hire employees. Incongruously, employees are excluded from the definition of “municipal advisor.”

Second, the proposed Rule does not contain a definition of the term “advice.” Nor does the Act. The SEC proposed a standard for elected board members concerning what they must do to avoid being required to register. It should adopt the same standard for all board members—including appointed citizen volunteers. Whether elected or appointed, all board members should be excluded from the definition of “municipal advisor” insofar as they are acting within the scope of their position as a member of the governing body. If they act as a municipal advisor separate and distinct from their position as a governing board member, they can and should be subjected to the registration requirements. As the Attorney General of Texas stated in his opposition to the proposed Rule, the SEC should make clear what this aforementioned standard means:

No votes or communications of board members made or distributed at or for official meetings, whether in public or in executive session, of the board of the municipal entity on which the appointed member serves, would constitute advice or a solicitation for purposes of the registration requirement. Furthermore, no communications by board members with the municipal entity’s attorneys or chief

administrator would constitute advice or a solicitation for purposes of the registration requirement. Nor would any communication by board members, made in furtherance of any duly authorized duty or assignment of the board members, constitute advice or a solicitation for purposes of the registration requirement.

Third, governing board members do not provide “advice to or on behalf of a municipal entity...” 15 U.S.C. § 780-4(e)(4). Allow me to use the Texas Higher Education Coordinating Board as an example. Board members, regardless of the subject under consideration, receive advice, discuss that advice, deliberate over the advice, and ultimately act upon it by voting. To characterize such reflective, thoughtful acts as “advice” stretches that term beyond recognition. Indeed, they are precisely the opposite. The Board members’ role is to provide direction to its staff employees and contractors so that the Texas Higher Education Coordinating Board can meet the objectives the Governor and Legislature have assigned it. Board members are not municipal advisors; instead, they are the recipients of advice who are responsible for making the final decisions on behalf of the agency. The real advisors are the staff employees and contractors.

Fourth, the Commission’s stated justification for treating appointed governing board members differently than elected members or employees lacks cogency when examined in light of how a municipal entity such as the Texas Higher Education Coordinating Board actually functions. The statute in issue does not require disparity in treatment of governing board members. No explanation is proffered of why being “accountable” to the municipal entity is the determining factor of a “municipal employee” so that an elected governing board member is considered an employee but an appointed member is not. The Commission does not explain why appointed members, in its view, are not “directly accountable ... to the citizens of the municipal entity” even though municipal employees are not required to be in order to be excluded from the reach of the proposed Rule.

Again using the Texas Higher Education Coordinating Board as an example, and as noted previously, the Board regularly files numerous reports with the Governor and Legislature, it responds to thousands of data requests and information requests from the Governor, the Legislature, and the general public on an annual basis, all of its meetings, including committee meetings, are public pursuant to the Texas Open Meetings Act, Chapter 551 of the Texas Government Code (and available to be viewed “live” over the internet), all of its records and documents are available in accordance with the Texas Public Information Act, Chapter 552 of the Texas Government Code, and the Board members annually have to file financial disclosure statements that include a member’s financial status, including securities and property owned, gifts, trust benefits or other sources of income, as well as describing any participation in lobbying activities and other board positions that are held by such officer. Those who fail to file the required financial statements are subject to civil and criminal penalties. These financial statements are public records and, as such, available to anyone upon request. Any governing board member violating the Open Meetings Act could be subject to criminal prosecution. Complete

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transparency and accountability is the hallmark of how the Texas Higher Education Coordinating Board, and other Texas agencies, operate.

Fifth, the proposed Rule will likely cause a number of citizen volunteers to withdraw from service, much less allow their names to be considered for future appointed service. It will likely cause even more potential citizen volunteers to refrain from accepting invitations to serve the State of Texas because they will not want to be subject to the regulations of the SEC in addition to state regulations. Texas, and other states, may end up in the position of paying the registration fees for citizen volunteers in order to attract them to serve. Should such a scenario eventuate, the proposed Rule would then operate as nothing more than an unfunded mandate whose seemingly illusory benefits, at least in Texas, are greatly outweighed by its costs.

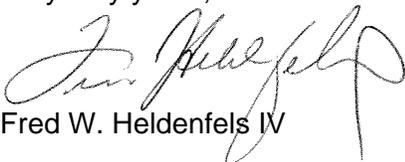
Finally, Chapter 572 of the Texas Government Code establishes the parameters for and governs ethical conduct of governing board members. It is more extensive in scope than the requirements of the proposed Rule. Chapter 572 requires governing board members publicly to disclose conflicts of interest, and refrain from voting on or participating in any decision in which they have or may have a conflict of interest. Those who fail to disclose conflicts of interest and refrain from participation may be removed from office. As the Attorney General of Texas indicated in his submission, "This information is available to both the Commission and participants in the municipal securities markets and thus satisfies the Commission's objectives for registration." Further, Chapter 572 prohibits gifts, employment, investments, or other compensation that could create a conflict of interest. The Texas Ethics Commission has oversight responsibility for the laws governing State officers, such as the members of the Texas Higher Education Coordinating Board.

Conclusion

I respectfully request that the SEC revise its interpretation of the definition of the term "municipal advisor" in the Rule to exclude appointed governing board members. Appointed board members are equally as accountable as elected board members; the phrase "employee of a municipal entity" should be interpreted to include appointed board members as well as elected board members and employees of a municipal entity. Simply stated, all board members should be treated equally. As I believe I have demonstrated in this letter, using the Texas Higher Education Coordinating Board as an example, the appointed Board members are indeed directly accountable to the citizens of the State of Texas and are completely transparent in all their discussions and decision-making.

Thank you for the opportunity to submit comments. Thank you also for your consideration in this most important matter.

Very truly yours,



Fred W. Heldenfels IV