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State Treasurer

State of Washington  
Office of the Treasurer

February 21, 2011

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

Re: File Number S7-45-10

Dear Ms. Murphy:

I am writing to express my concerns about certain provisions of proposed rules issued by the Securities and Exchange Commission (the "Commission") in Release No. 34-63576, dated December 20, 2010 (the "Release"), regarding the registration of "municipal advisors" as described in the proposed rules and the Release. In particular, I am concerned that the Commission's interpretation of the exclusion from the definition of a "municipal advisor" for "an employee of a municipal entity" is unduly restrictive and would have significant adverse impacts on public participation in State and local governance.

In the Release, the Commission states its view that the exclusion from the definition of "municipal advisor" for "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 such, and also should include an appointed member of a governing body, but only if that member is appointed *ex officio* by virtue of holding another elective office. The Commission further states its view that other persons who are appointed members of the governing body of a municipal entity should not be excluded from the definition of "municipal advisor" because "they are not directly accountable for their performance to the citizens of the municipal entity." Release at pp. 40-41.

My concerns are best understood by describing the potential impact of these proposed rules on two different types of municipal entities in the state: (1) the State Investment Board and (2) conduit governmental authorities who are empowered to issue bonds on behalf of the state.

First, the Washington State Investment Board (WSIB) provides us with a useful perspective for the purpose of this letter. The WSIB invests approximately \$76.7 billion for 39 public employee benefit plans and other public trust funds. Its governing body consists of 10 voting members who are trustees of the investment funds and responsible for making the investment decisions. They are assisted by five non-voting members, the WSIB's professional investment staff, and investment advisors under contract to the WSIB. This governance structure has been in place since 1981 when the WSIB was created.



The WSIB voting members include three ex officio members: myself as State Treasurer and the appointed heads of the departments of Labor and Industries and Retirement Systems; two legislators who are appointed by the leadership of the state House and Senate; and, five representatives of the state's retirement plans who are appointed by various elected officials.

The investment expertise of the voting members varies widely. To provide additional professional experience, our statute allows the voting members to select five non-voting members who are "considered experienced and qualified in the field of investments." Typically, the non-voting members are successful investors who view their board participation as a civic duty or an opportunity to "give back" to the community. Board members are essentially volunteers. Each is paid \$50 per meeting and receives no other compensation for their time. All Board members are fiduciaries with respect to the funds under their control and are subject to various state laws and WSIB policies designed to ensure ethical conduct and prohibit conflicts of interest.

The Commission's view that appointed members of an entity's governing body are less accountable than the entity's employees is inconsistent with our governance structure and experience and inaccurate based on our experience. The Board members are the public face of the WSIB. State law requires that their meetings be held and all decisions made in public. All of our Board members are directly or indirectly accountable to the citizens and their constituencies and we have noticed no difference in political accountability attributable to the manner in which the members reached the Board.

It would be unfortunate if these proposed rules are written to require volunteer investment board members to register as municipal advisors. The prospect of additional paperwork, federal oversight, and potential liability will discourage candidates and it will become much more difficult, if not impossible, to locate qualified people to fill the appointed positions. That would be regrettable because our existing governance structure has well served the state and our beneficiaries and this additional federal regulation would seem to offer little additional protection to the public.

The governance of conduit governmental authorities provides an important second perspective on the effect of the proposed regulations. In the state of Washington, as in most other States, the Legislature has created a number of governmental authorities that are empowered to issue bonds and other obligations "on behalf of" the State to finance health care, higher education, housing and economic development facilities for private nonprofit hospitals, higher education institutions, low-income housing organizations and certain types of business organizations. These authorities include the Washington Health Care Facilities Authority, the Washington Higher Education Facilities Authority, the Washington State Housing Finance Commission and the Washington Economic Development Finance Authority.

One common factor among these authorities is that, under the state laws which created them, many of the members of their governing bodies are citizens appointed by the Governor as "public members" in recognition of their interest, experience and knowledge in the area in which the authority functions. These "public members" are neither employees of the authority nor elected officials appointed *ex officio* by virtue of holding an elective office.

For example, the Washington Higher Education Facilities Authority has seven members, four of whom must be "public members" (of which one must be the president of a higher education institution) appointed by the Governor on the basis of their interest or expertise in the provision and financing of higher education. Any public member may be removed by the Governor for misfeasance, malfeasance, willful neglect of duty or any other cause. Only the Governor and Lieutenant Governor are designated as members of this Authority *ex officio* by virtue of elective office.

Similarly, the Washington State Housing Finance Commission has 11 members, eight of whom must be “public members” appointed by the Governor either as representatives of housing consumer interests, labor interests and low-income housing interests or on the basis of their geographic location and expertise in housing, real estate, finance, energy efficiency or construction. Any public member may be removed by the Governor for cause. Only the State Treasurer is a member *ex officio* by virtue of elective office.

Finally, the Washington Economic Development Finance Authority has 17 members, which must include ten public members appointed by the Governor on the basis of their interest or expertise in trade, agriculture or business finance or job creation and development. The Governor may remove any public member for cause. Only the State Treasurer and certain state legislators are members *ex officio* by virtue of elective office.

Another common factor among these authorities is that their public members receive little or no compensation for their services to the authority. Generally, a public member is entitled to receive \$50 *per diem* for attendance at meetings and reimbursement for related out-of-pocket expenses, subject to certain limitations.

Further, under Washington law, as in many other states, appointed public members of these authorities are subject to ethical rules that, broadly speaking, prohibit any public officer from obtaining private gain by virtue of his or her position as a public officer. *See, e.g.*, Chapter 42.52 RCW, Ethics in Public Service, and Chapter 42.23 RCW, Code of Ethics for Municipal Officers—Contract Interests. Moreover, trading in special influence (including conferring a benefit on a public servant with intent to secure a particular result) is a felony. RCW 9A.68.050.

Appointed public members of the authorities described above are not “employees” and, with very few exceptions, are not members *ex officio* by virtue of an elective office. The members *constitute* the authority. Part of their responsibilities consists of considering and evaluating proposed issuances of municipal securities. Some public members may have particular interest, knowledge and experience relating to public finance in the area in which the authority functions; indeed, the Legislature has specified these factors as relevant criteria for the Governor to use in appointing members. However, these members are not acting, and certainly are not compensated, as “municipal advisors” to the authority. They are simply sharing with fellow authority members such knowledge and experience as they may have as part of the authority’s deliberative process in carrying out its functions.

The Commission has expressed its view that appointed members of a governing body of a municipal entity should be “directly accountable for their performance to the citizens of the municipal entity.” Release at p. 41. However, the fact that appointed members of these Washington authorities may be removed at any time by the Governor for misfeasance, malfeasance or other misconduct demonstrates that those members are more directly and expeditiously accountable for their performance than members who are elected officials and may be subject to removal only through a periodic and uncertain electoral process.

In light of the statutory framework for the bond-issuing authorities of the state of Washington described above, this Office urges the Commission to reconsider its proposed exclusion from the definition of “municipal advisor” for “employees of a municipal entity.” As proposed, the exclusion is unduly and unnecessarily restrictive, misapprehends the true roles of appointed members of bond-issuing authorities, and fails to take account of the ample and very direct means that exist under state law for holding such members accountable for their performance.

The Office of State Treasurer believes that the Commission’s imposition on appointed “public members” of Washington’s bond-issuing authorities the registration requirements applicable to “municipal

advisors,” together with registration and annual fees, training and periodic examination requirements as well as additional potential federal securities law liability, will significantly discourage our citizens from participating in the important functions that these authorities serve in the state of Washington.

While this letter focuses upon our concerns with respect to the State Investment Board and state-level bond-issuing authorities, Washington law also authorizes local government units such as counties, cities and port districts to establish public development authorities and other types of public corporations that engage in municipal finance and have comparable “public members” of their governing boards who are not employees or elected officials. These municipal entities and the appointed members of their governing boards would be similarly adversely affected by the Commission’s proposed treatment of those persons as “municipal advisors.”

We appreciate the opportunity to provide comments on the proposed rules, and also will appreciate the Commission’s consideration of the concerns set forth in this letter.

Very truly yours,



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STATE TREASURER