



UNIVERSITY OF HOUSTON SYSTEM
BOARD OF REGENTS

CARROLL ROBERTSON RAY
Chair

February 22, 2011

Ms. Mary L. Schapiro
Chairman, Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

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

Re: S.E.C. Release No. 34-63576: File No. S7-45-10 (Dec. 20, 2010)

Dear Ms. Schapiro and Ms. Murphy:

In a Release dated October 20, 2010 (the "**Release**"), the Securities and Exchange Commission (the "**SEC**") announced proposed new rules 15Ba1-1 through 15Ba1-7 (the "**Proposed Rules**"), applying the concepts of the Dodd-Frank Wall Street Reform and Consumer Protection 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.

For myself and on behalf of the Board of Regents of the University of Houston System, I urge you to reconsider the SEC's decision not to exempt appointed officials from the definition of "municipal advisor" and to focus, instead on accountability – not only of appointed officials but also of elected officials and employees – for application of the registration requirements.

The regents of the University of Houston System (the "**University**"), along with the regents of the other public colleges and universities in the State of Texas, are appointed by the Governor of the state and confirmed by the Senate. We believe the Proposed Rules make an artificial distinction between the employees

and the appointed members of the governing board (the “**Board of Regents**”) of the University, and further artificially distinguish between the appointed members of the governing acting within their official capacity and the government entity. The purpose of the distinction, according to the Release, is that “employees ... are accountable to the municipal entity for their actions” whereas “appointed members [such as the University Regents] ... are not directly accountable for their performance to the citizens of the municipal entity.” (Release at p. 41.)

This is not the case for the University Regents or for any other members of the governing boards of the other Texas public colleges and universities.

Each member of a governing board has the legal responsibilities of a **fiduciary** in the management of funds under the control of institutions subject to the board's control and management.

Tex. Educ. Code Ann. §51.352(e) (emphasis added). Under Texas law, our obligations to the University include the following:

- the duty of loyalty and utmost good faith
- the duty of candor
- the duty to refrain from self dealing – “self” being understood to extend to each Regent’s spouse, agents, employees, and other persons whose interests are closely identified with the Regent’s
- the duty to act with integrity of the strictest kind
- the duty of fair, honest dealing
- the duty of full disclosure, including disclosure of all important information concerning any transaction or matter that might influence the Regent to act in a manner prejudicial to the interests of the University.

Michol O’Connor, *O’Connors Causes of Action* (Jones McClure 2008) at 246-47 (citations omitted). Further, the breach of a Regent’s fiduciary obligations to the University is a tort.

The elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant, (2) a breach by the defendant of his fiduciary duty to the plaintiff, and (3) an injury to the plaintiff or benefit to the defendant as a result of the defendant's breach.

Lundy v. Masson, 260 S.W.3d 482, 501 (Tex.App.—Houston [14th Dist.] 2008, writ ref’d).

Therefore, at least in Texas, a state university's (appointed) regents are fully and "directly accountable for their performance to the citizens of the municipal entity" to no lesser degree than is a university employee. In fact, Texas law recognizes a much lesser obligation owed by an employee to an employer. An employee is not necessarily her employer's fiduciary and, "[e]ven the existence of a fiduciary relationship between employee and employer 'does not preclude the fiduciary from making preparations for a future competing business venture; nor do such preparations necessarily constitute a breach of fiduciary duties.'" *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 284 (5th Cir. 2007), citing *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 510 (Tex.App.—Houston [1st Dist.] 2003 no pet.). If the purpose of the Proposed Rules is to protect the public from self-dealing, then the focus should be on the obligations of the individuals involved and not their title or the means they obtained them.

We also understand that the SEC intends, by way of the Proposed Rules, to monitor the qualifications of the University Regents. The concern underlying this proposed process is likewise misplaced because we have been vetted, scrutinized and approved by both the executive and legislative branches of Texas government. As noted, members of the governing boards of Texas public universities are appointed by the Governor of the state of Texas and confirmed by a two-thirds vote of the Texas Senate. We may be impeached in accordance with Tex. Gov't Code Ann. Chapter 665.

University Regents are subject to the requirements of Tex. Gov't Code Ann. Chapter 572, Personal Financial Disclosure, Standards of Conduct, and Conflict Of Interest ("**Chapter 572**"), and the University's accreditation relies in no small part on the University Regents' documented compliance with The Southern Association of Colleges and Schools ("**SACS**") Core Requirements for Accreditation.

Chapter 572 requires each University Regent to deliver to the Texas Ethics Commission his or her "verified financial statement" complying with the specific statutory requirements, including the Regent's "financial activity." (Tex. Gov't Code Ann. §572.023.) Financial activity includes:

- occupational income¹
- shares of stock (or net gain or loss realized)²
- bonds, notes, and other commercial paper (or net gain or loss realized)³
- interest, dividends, royalties, or rents income in excess of \$500⁴
- each guarantor of a loan in excess of \$1,000⁵

¹ Tex. Gov't Code Ann. §572.023(b)(1)

² Tex. Gov't Code Ann. §572.023(b)(2)

³ Tex. Gov't Code Ann. §572.023(b)(3)

⁴ Tex. Gov't Code Ann. §572.023(b)(4)

- beneficial interests in real property and business entities (or net gain or loss realized)⁶
- each person or organization from whom or which the Regent or the Regent's spouse or dependent children received a gift of anything of value in excess of \$250 and a description of each such gift⁷
- income received as beneficiary of a trust in excess of \$500⁸
- assets and liabilities of a corporation, firm, partnership, limited partnership, limited liability partnership, professional corporation, professional association, joint venture, or other business association in which 50 percent or more of the outstanding ownership was held, acquired, or sold⁹
- boards of directors of which the Regent is a member and executive positions that the Regent holds in legal entities¹⁰
- any person providing transportation, meals, or lodging expenses permitted under Tex. Penal Code Ann. §36.07(b), and the amount of those expenses¹¹
- any business association, excluding a publicly held corporation, in which both the Regent and a lobbyist registered under Tex. Gov't Code Ann. Chapter 305 have an interest¹²
- the number of shares of any mutual (or net gain or loss realized)¹³

Under Chapter 572, each Regent faces "imposition of civil penalties by the [Texas Ethics] commission in addition to criminal penalties or other sanctions imposed by law" for noncompliance. (Tex. Gov't Code Ann. §572.007.)

The University obtains its accreditation from SACS. SACS's Core Requirements¹⁴ include that the University's Board of Regents:

- is free of any contractual, employment, or personal or familial financial interest in the University (Core Requirement 2.2)
- has a policy addressing conflict of interest for its members (Core Requirement 3.2.3)

⁵ Tex. Gov't Code Ann. §572.023(b)(5)

⁶ Tex. Gov't Code Ann. §572.023(b)(6)

⁷ Tex. Gov't Code Ann. §572.023(b)(7)

⁸ Tex. Gov't Code Ann. §572.023(b)(8)

⁹ Tex. Gov't Code Ann. §572.023(b)(9)

¹⁰ Tex. Gov't Code Ann. §572.023(b)(10)

¹¹ Tex. Gov't Code Ann. §572.023(b)(11)

¹² Tex. Gov't Code Ann. §572.023(b)(12)

¹³ Tex. Gov't Code Ann. §572.023(b)(13)

¹⁴ SACS's Principles of Accreditation, including the Core Requirements, may be found online at <http://www.sacscoc.org/pdf/PrinciplesOfAccreditation.PDF>

Mary L. Schapiro
Elizabeth M. Murphy
File Number S7-45-10
2/22/11
Page 5 of 5

- is free from undue influence from political, religious, or other external bodies and protects the University from such influence (Core Requirement 3.2.4)

The existing statutory and regulatory requirements affecting the Regents of the University of Houston System (and the members of the governing boards of the other public Texas universities) already address and satisfy all of the aims of the Proposed Rules. The Proposed Rules are an unnecessary regulatory burden that would require duplicative paperwork and considerable expenditure of funds without adding value of any kind. As such, the Proposed Rules would create a chilling effect on prospective University Regents, unnecessarily tax already strained public resources and yield no effect whatsoever. Further, the Proposed Rules raise substantial questions of state authority under the Tenth Amendment of the United States Constitution.

Sincerely,
The University of Houston System



Carroll Robertson Ray
Chair, Board of Regents