



BILL LOCKYER
TREASURER
STATE OF CALIFORNIA

February 22, 2011

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

RE: SEC Release No. 34-63576, 76 FR 824 (January 6, 2011) (the "Release")

Dear Ms. Murphy:

The California State Treasurer's Office appreciates this opportunity to share our comments and concerns regarding how the proposed interpretation of the registration requirements applicable to "municipal advisors" would impact appointed members who serve on financing authority boards.

The U.S. Securities and Exchange Commission ("Commission") Release includes a potentially expansive interpretation of the recently enacted and currently effective amendment to Section 15B of the Securities Exchange Act of 1934 (as amended, the "Exchange Act"). Section 15B requires that "municipal advisors" register with the Commission and the Municipal Securities Rulemaking Board ("MSRB"), and subjects "municipal advisors" to other statutory and regulatory requirements. The Exchange Act expressly excludes municipal entities and employees of municipal entities from the definition of "municipal advisors." However, in the Release, the Commission interprets the term "municipal advisor" to include unelected board members of municipal issuers who "advise" a governmental entity on whose board they sit regarding, among other topics, the issuance of municipal securities and/or the investment of governmental funds.

Background

The Commission's interpretation is problematic for several reasons; but it might first be helpful to provide background on the appointed board members who serve on the financing authorities of the State of California (the "State"). There are ten financing authorities: California Alternative Energy and Advanced Transportation Financing Authority, California Educational Facilities Authority, California Health Facilities Financing Authority, California Housing

Ms. Elizabeth Murphy

February 22, 2011

Page 2

Finance Agency, California Infrastructure and Economic Development Bank, California Pollution Control Financing Authority, California School Finance Authority, California Transportation Financing Authority, and California Urban Waterfront Area Restoration Financing Authority, and the State Public Works Board¹. The members who serve on these boards comprise four distinct categories. Attachment A lists each of the boards and the statutorily required composition of each.

The first category is elected officials, who by the terms of the proposed rule, are exempt from registration requirements, and, therefore, not relevant to this comment.

The second category is comprised of board members who are statutorily designated members of specific boards. For example, Public Resources Code section 26004 provides that, among others, the board of the California Alternative Energy and Advanced Transportation Financing Authority shall include the Director of Finance, the Chair of the State Energy Commission, and the President of the California Public Utilities Commission. These board members have been appointed by the Governor to serve in high-level positions. As a matter of state law, they are required to serve on the board of one or more state finance authorities and do not receive any additional compensation as a result of their service on the boards. To be clear, these board members are not elected, but appointed by virtue of the positions they hold in state government. Each board listed in Attachment A includes at least one board member in this category.

The third category is comprised of board members who are not employees of the State, but who serve on the board of the above listed financing authorities. Under statutory authority, these members are appointed to the board by elected officials including the Governor, Assembly Speaker and Senate Rules Committee. The board members in category three are typically members of the general public who do not possess or need specialized investment knowledge or skill. They are appointed because they have expertise in policy relevant to the financing authority's jurisdiction. For instance, the Governor must appoint two members of the public to the California Educational Facilities Authority. One of those must be a representative of a public university, while the other must be a representative of a private university. Similarly, on the California Health Facilities Financing Authority, six members of the public are appointed. The Senate Rules Committee appoints one member who is a licensed physician and another who is a hospital executive. The Assembly Speaker appoints a member of the public and a representative from the investment/finance sector. The Governor appoints two members of the public. The one appointment by the Assembly Speaker is the only appointed member of any of the State financing authorities who must have specific finance related experience. All board members in

¹ All of the State of California financing authorities except the California Housing Finance Agency, California Infrastructure and Economic Development Bank, and the State Public Works Board are chaired by the California Treasurer. In addition, the Treasurer chairs the ScholarShare Investment Board, the State of California entity responsible for administering the State's 529 college savings plan. Because 529 plans have been interpreted to be municipal securities, this proposed rule may also apply to ScholarShare board members.

this category are volunteers who do not receive compensation and are prohibited by State law from having an economic interest on any matter coming before them.

The fourth category of individuals who appear to be affected by the proposed rule are those who are designated by a board member to serve on their behalf. For instance, although the Treasurer and Director of Finance, by statute, are members of each of the boards listed in Attachment A, and the Controller is a member of all but two, those individuals frequently do not participate in board meetings because of the press of other business. Instead, consistent with state law, they delegate the responsibility to serve and cast votes on their behalf to employees of their respective offices. The designated individuals are not elected officials themselves, but are instead deputies or high-ranking managers of the respective offices. They are not employees of the financing authorities.

Discussion

The Commission's interpretation of rule 15B is problematic for several reasons. First, the interpretation lacks a clear definition of what constitutes advice in the "municipal advisor" context. As such, we incline to err on the side of caution and assume that the term "advise" will be construed broadly. Our concern is simple: During board meetings, members are required to vote on transactions which involve the timing, structure, and plan of certain financial products. The board member, to conduct his or her due diligence, must ask questions to find out the financial soundness of a transaction. This requires a discussion between the members as to why the deal may or may not be prudent. Our concern is that in inquiring about the fiscal soundness of a transaction, a board member would subject him or herself to the registration requirement.

The role of the board members is to serve as decision-makers. Board members do not advise staff. They do not advise borrowers. They do not advise members of the financing team working on a transaction. Instead, board members are effectively the municipal entity they serve, since the entity cannot make a decision other than through its board. The board members, whether elected, appointed, or a designee of an elected member, constitute the principal, not an "advisor" to the principal. Municipal entities act through governing bodies which necessarily are comprised of individual members.

A board member may vote without explaining the decision. On the other hand, a member may explain his or her reasons for a vote or make comments that may influence other board members in, for example, authorizing the financing of a project. Both, however, are not advising the entity, but exercising their statutorily-mandated duty as board members. Consequently, even though one makes statements and the other does not, both should fall outside the purview of the proposed rule. An interpretation of "municipal advisor" that subjects governmental board members to federal regulation if they disclose their thinking prior to a vote but not if such thinking is not disclosed cannot be a sensible interpretation of Congressional intent.

In addition, where a finance authority has adopted an investment policy, which is not necessarily the case with all of the State's finance authorities, input board members provide with respect to

that investment policy cannot be viewed as similar to the advice of a municipal advisor. Instead, where board members make suggestions regarding investment options to board employees, or approve revisions to a formal investment policy, such input is that between one branch of the principal and another. It is, in essence, the board members fulfilling their fiduciary duty to the board.

Second, the Commission's distinction between the treatment of elected and unelected board members of a municipal entity is not warranted by the facts. Appointed board members already are regulated by the State and, thus, held accountable for their actions. As explained above, many board members on the State's financing authorities are appointed, rather than elected to their office. Their appointment is typically made by the Governor or another high-level elected official, and either state law or the elected appointing officials determine the appropriate qualifications. Each of these members is subject to rules regarding conflicts of interest. They are required to file an annual statement of economic interests, and they must attend bi-annual ethics training. In addition, they are subject to oversight and removal by their appointing power, so the notion that they are less accountable to the public than directly elected members does not hold up. Indeed they are more closely accountable as they may be removed more quickly than waiting for an election as much as four years away. Moreover, the financing authority board members have the same fiduciary duties and obligations set forth in state law as elected or ex-officio appointed members. Through their appointment by the Treasurer, Governor and other public officials, the appointed board members have the same public obligations as elected and ex-officio appointed members.

It is also important that the regulations not place an artificial and unwarranted emphasis on the precise entity which employs an individual. It is very common in state and local government for employees of one agency or entity to provide services to another; this is in most cases more cost-effective and may be mandated by law. It is completely illogical and unfair that an employee of, say, the State Treasurer's Office becomes subject to regulations and filing requirements because he or she serves as a deputy on the board of a different agency.

Lastly, the application of the registration requirement for financial advisors to appointee Board members or designees of elected Board members is unnecessary, particularly in light of the fact that such Board members are not actually engaged in advising the Boards, that none of the board members of these finance authorities receive additional compensation for their service, and, in fact, are prohibited by State law from having an economic interest in any matter on which they vote. The fees, reporting, and other regulatory requirements associated with the MSRB filing would make it extremely difficult for the State to attract a diverse group of board members. Moreover, the superficial analysis in the proposed rules (see 76 FR at 873-876) relates almost entirely to filling out paperwork and hardly scratches the surface of the true regulatory burden. A meaningful consideration of the economic burden requires a full analysis of the costs of obtaining and retaining board members, providing legal counsel that must be paid by individuals or the authorities (considering that many authorities have only a few employees), insurance to cover new liabilities, and other economic factors, such as disruption to the proper functioning of state and local bond financing.

Ms. Elizabeth Murphy

February 22, 2011

Page 5

Recommendation

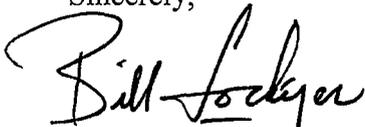
The solution is simple. We believe it is essential that the Commission adopt a bright-line exemption or safe-harbor provision under which statutory board members, appointed board members, and individuals who serve as designees of statutory or elected board members would not be subject to the registration requirement. Again, to require such board members to register as municipal advisors would mischaracterize the nature of the work they perform and place an unnecessary burden on individuals who are fulfilling a civic duty.

In the alternative, the State Treasurer's Office ("STO") respectfully requests that the Commission define "advise" to specifically exclude board member activities such as voting and discussing agenda items in open, noticed board meetings.

At a minimum, the STO requests that the Commission clarify that statutorily appointed board members who are employees of the State (category two) as well as employees who serve as designees for statutory board members, either appointed or elected, (category four) be exempted from the municipal advisor registration requirement since they are, in fact, State employees. While we note that the proposed rule includes an exception for employees of a municipal entity, it is not clear, in the context of the State's financing authorities, whether that exception applies only to employees of the finance authorities or whether it also applies to board members or their designees who are employees of the State.

We sincerely appreciate the opportunity to provide these comments. We would welcome the opportunity to discuss this issue in more detail with Commission staff. Please direct any questions or requests for more information to Mark Paxson, General Counsel, at 916-651-6846 or mpaxson@treasurer.ca.gov. Thank you for your consideration in this matter.

Sincerely,



BILL LOCKYER
California State Treasurer

Attachment A

ScholarShare Investment Board

(Education Code section 69984)

Treasurer (Elected Official)

Director of Finance (An Executive Branch position appointed by the Governor)

Secretary of Education (An Executive Branch position appointed by the Governor)

Member of the Student Aid Commission (An Executive Branch position appointed by the Governor)

Member of the Public (Appointed by the Governor)

California public college representative (Appointed by the Senate Committee on Rules)

Independent college/vocational school representative (Appointed by the Assembly Speaker)

California Alternative Energy and Advanced Transportation Finance Authority

(Public Resources Code section 26004)

Treasurer (Elected Official)

Controller (Elected Official)

Director of Finance (An Executive Branch position appointed by the Governor)

Chairperson of the State Energy Commission (Appointed by the Governor)

President of the Public Utilities Commission (Appointed by the Governor)

California Educational Facilities Authority

(Education Code section 94120)

Treasurer (Elected Official)

Controller (Elected Official)

Director of Finance (An Executive Branch position appointed by the Governor)

Public university representative (Appointed by the Governor)

Private university representative (Appointed by the Governor)

California Health Facilities Finance Authority

(Government Code section 15433)

Treasurer (Elected Official)

Controller (Elected Official)

Director of Finance (An Executive Branch position appointed by the Governor)

A licensed physician (Appointed by the Senate Committee on Rules)

A hospital executive (Appointed by the Senate Committee on Rules)

An investment/finance representative (Appointed by the Assembly Speaker)

A member of the public (Appointed by the Assembly Speaker)

Two members of the public (Appointed by the Governor)

Ms. Elizabeth Murphy

February 22, 2011

Page 7

California Housing Finance Agency
(Health and Safety Code section 50901)

Treasurer (Elected Official)

Secretary of Business, Transportation and Housing (An Executive Branch Position appointed by the Governor)

Director of Housing and Community Development (An Executive Branch Position appointed by the Governor)

Six members of the public (Appointed by the Governor)

Four of the six are to be from seven categories, including a city or county elected official involved in housing planning, a banking/residential real estate representative, a housing developer, a construction labor representative, a low-income housing management representative, a manufactured housing finance representative, and a member of the public. The other two Governor appointees must be residents of housing financed by the agency or persons involved in assisting tenants.

A member of the public (Appointed by the Assembly Speaker)

A member of the public (Appointed by the Senate Rules Committee)

California Infrastructure and Economic Development Bank
(Government Code section 63021.5)

Director of Finance (An Executive Branch position appointed by the Governor)

Treasurer (Elected Official)

Secretary of Business, Transportation and Housing Agency (An Executive Branch position appointed by the Governor)

A member of the public (Appointed by the Governor)

Secretary of State and Consumer Services Agency (An Executive Branch position appointed by the Governor)

California Pollution Control Finance Authority
(Health & Safety Code section 44515)

Treasurer (Elected Official)

Controller (Elected Official)

Director of Finance (An Executive Branch position appointed by the Governor)

California School Finance Authority
(Education Code section 17174)

Treasurer (Elected Official)

Superintendent of Public Instruction (Elected Official)

Director of Finance (An Executive Branch position appointed by the Governor)

Ms. Elizabeth Murphy

February 22, 2011

Page 8

California Transportation Finance Authority

(Government Code section 64103)

Treasurer (Elected Official)

Controller (Elected Official)

Director of Finance (An Executive Branch position appointed by the Governor)

Director of Transportation (An Executive Branch position appointed by the Governor)

Executive Director of the California Transportation Commission (An Executive Branch position appointed by the Governor)

Local agency representative (Appointed by the Assembly Speaker)

Local agency representative (Appointed by the Senate Committee on Rules)

California Urban Waterfront Area Restoration Financing Authority

(Public Resources Code section 32050)

Treasurer (Elected Official)

Controller (Elected Official)

Director of Finance (An Executive Branch position appointed by the Governor)

Secretary of Resources Agency (An Executive Branch position appointed by the Governor)

Executive Director of the State Coastal Conservancy (Head of the Conservancy appointed by the Conservancy board, which is made up entirely of appointees of elected officials or individuals appointed by Governor Appointees)

Public Works Board

(Government Code section 15770)

Treasurer (Elected Official, serves only with respect to matters related to the issuance of revenue bonds)

Controller (Elected Official, serves only with respect to matters related to the issuance of revenue bonds)

Director of Finance (An Executive Branch position appointed by the Governor)

Director of Transportation (An Executive Branch position appointed by the Governor)

Director of General Services (An Executive Branch position appointed by the Governor)