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February 22, 2011

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

Re: SEC File No. S7-45-10  
Release No. 34-63576

The Pennsylvania State Employees' Retirement System (SERS) respectfully submits its comments to the Securities and Exchange Commission (SEC) pursuant to Release No. 34-63576 (the "Release"), which proposes to adopt rules 15Ba1-1 to 15Ba1-7<sup>1</sup>(the "Proposed Rules").

Although SERS is a signatory to and concurs with the points raised in the comment letter submitted by the National Conference on Public Retirement Systems (NCPERS)<sup>2</sup>, we write separately to highlight certain distinctive features of SERS' Board and Pennsylvania law.

SERS is one of the nation's oldest and largest public pension plans. Established in 1923, SERS has more than 210,000 members and assets of approximately \$25.4 billion as of December 31, 2010. Administering a defined benefit plan, SERS provides retirement benefits according to a fixed benefit formula.

SERS Board (the "Board") is comprised of 11 members: the State Treasurer, ex officio; two senators appointed by the President pro tempore of the Senate; two members of the House of Representatives appointed by the Speaker of the House; and six members appointed by the Governor, subject to senate confirmation.<sup>3</sup>

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<sup>1</sup> 17 CFR 240.15Ba1-1 to 240.15Ba1-7

<sup>2</sup> SERS also concurs with and adopts the thoughtful comments submitted by counsel for the New York State Teachers' Retirement System ("NYSTRS"), dated February 18, 2011 and the El Paso Firemen & Policemen's Pension Fund ("El Paso"), dated February 18, 2011.

<sup>3</sup> 71 Pa.C.S. §§5901(a) and (b). Furthermore, at least five of the Board members must be members of SERS and at least two shall have ten or more years of credited state service. At least one Board member must be an annuitant of SERS.

## INTRODUCTION:

An extensive panoply of Pennsylvania laws govern the conduct and frame the duties of Board members, including, but not limited to, the State Employees' Retirement Code<sup>4</sup> ("Retirement Code"), the Right-to-Know Law<sup>5</sup>, the State Ethic Law<sup>6</sup>, the Governor's Code of Conduct<sup>7</sup> ("Code of Conduct"), the House and Senate Ethics Rules, the Sunshine Law<sup>8</sup> and common law. These laws already impose significant responsibilities on Board members. While SERS applauds and supports the SEC's objective of creating greater transparency, if Board members were required to register with the SEC as a "municipal advisor," the reporting requirements would be unduly burdensome without adding any additional value since it is either duplicative of what is already require by state law or requests information irrelevant to their role as a Board member. Moreover, as discussed in greater detail in the NCPERS, NYSTRS and El Paso comment letters, imposing federal reporting and record-keeping requirements raises potential constitutional concerns and the possibility of conflicts with existing state law.

Second, the Board has the authority to make all decisions with respect to the implementation of the Retirement Code and the management of the State Employees' Retirement Fund subject to a "prudent investor" standard.<sup>9</sup> This includes the authority to hire such professional personnel, including investment consultants and advisors, as deemed advisable.<sup>10</sup> Board members do not receive compensation<sup>11</sup> and are fully occupied outside of their service on the Board. None of them are brokers, dealers, investment advisors or otherwise currently serve as an investment professional. Thus, they rely on SERS' investment office staff, consultants and investment managers to provide the guidance they need to fulfill their fiduciary duty<sup>12</sup>. While the Board makes decisions regarding general policy and direction for SERS and the hiring and firing of managers, it does not provide advice to SERS. Rather, the Board receives advice and acts upon that advice.

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<sup>4</sup> 71 Pa.C.S. §§5101 *et seq.*

<sup>5</sup> 65 P.S. §§67.101 *et seq.*

<sup>6</sup> 65 Pa.C.S. §§1101 *et seq.*

<sup>7</sup> 4 Pa. Code §§7.151 *et seq.*

<sup>8</sup> 65 Pa.C.S. §§701 *et seq.*

<sup>9</sup> 71 Pa.C.S. §5931(a). Specifically, the Board must exercise "that degree of judgment, skill and care under the circumstances then prevailing which persons of prudence, discretion and intelligence, who are familiar with such matters, exercise in the management of their own affairs..." Accordingly, the "prudent investor" standard imposed upon the Board is a higher, more rigorous standard that of a "prudent person."

<sup>10</sup> 71 Pa.C.S. §5902(b)

<sup>11</sup> 71 Pa.C.S. §5901(d). Board members are reimbursed for necessary expenses and Board members who are not members of SERS receive per diem of \$100 when attending meetings.

<sup>12</sup> 71 Pa.C.S. §5931(e)

Lastly, SERS believes that the distinction drawn in the Release between appointed and elected members is one without a difference for certain Board members. Although the legislative leaders of the General Assembly appoint the four legislative members of the Board, legislative Board members are nevertheless elected by citizens of the Commonwealth in a general election. The Release appears to require these “appointed” legislative Board members to register as a “municipal advisor” even though they are in functionally no different a position as the Commonwealth’s State Treasurer, an elected official, who sits on the Board *ex officio*.

**COMMENTS:**

- 1) **Increased burden with no value added:** Board members should be expressly excluded from the definition of “municipal advisor.” Assuming, *arguendo*, that the activities of “municipal advisors” have gone largely unregulated, SERS Board is already subject to a strict fiduciary duty to act solely for the benefit of SERS’ members subject to a “prudent investor” standard. Board meetings are conducted in public session pursuant to the Commonwealth’s Sunshine Law and Board members are annually required to file their Statement of Financial Interest disclosure forms with the State Ethics Commissions (and gubernatorial appointees to the Board must additionally file a separate financial disclosure form pursuant to the Code of Conduct). The Board is already “regulated” at the state level and imposing an additional layer of federal regulation may deter individuals from being willing to serve on the Board.
- 2) **Board Members Do Not Advise SERS:** The Retirement Code expressly allows for the Board to hire professional personnel as deemed advisable. No Board member is employed as a broker, dealer, investment advisor or other investment professional. Given the “prudent investor” standard that is statutorily imposed upon the Board, it is necessary for the Board to delegate the responsibility of providing expert advice to outside personnel such as investment office staff (who are employees of SERS and thus exempted from the definition of “municipal advisor”), consultants and investment managers (who are already registered with the SEC). The Board makes broad policy decisions and investment manager hiring-termination decisions based on the advice that it **receives** from these sources. SERS respectfully submits that decision making is not the same as advising. Accordingly, Board members should not be considered a “municipal advisor” for purposes of the Proposed Rules.
- 3) **Appointed vs. Elected:** The four legislative Board members are elected to the General Assembly by citizens of the Commonwealth. They are appointed to the Board by their respective legislative leaders. As set forth in the Release, these legislative Board members would be required to register as a “municipal advisor” under the Proposed Rules. SERS respectfully submits that this was not an intended result under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) amendments to Section 15B of the Exchange Act.<sup>13</sup> These legislative Board members are just as accountable to their constituents as the State Treasurer, who is also an elected official and sits on the Board *ex officio*. The citizens of the Commonwealth have the ability to vote out any of these public officials regardless of whether their seat on the Board is *ex officio* or appointed. The

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<sup>13</sup> 15 U.S.C. 78o-4. All references in this Release to the Exchange Act refer to the Exchange Act as amended by the Dodd-Frank Act.

distinction drawn in the Release between appointed and elected members to the Board does not result in any greater transparency to or provide more protection for SERS' members. It is also respectfully submitted that it is not appropriate to distinguish between elected and appointed Board members since every Board member is subject to and regulated by the same state laws.

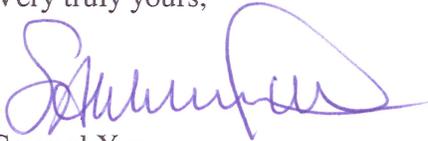
**CONCLUSION:**

For all of the foregoing reasons, SERS respectfully suggests that board members of public pension funds should be:

- 1) defined as being the municipal entity; or
- 2) defined as an employee of the municipal entity; or
- 3) expressly exempted from the definition of "municipal advisor."

SERS will promptly respond to any questions or requests for further information. Thank you for your time and consideration and the opportunity to comment on this important matter.

Very truly yours,



Samuel Yun  
Acting Chief Counsel