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February 22, 2011

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

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

Dear Chair Schapiro and Members of the Commission,

Thank you for the opportunity to comment on the regulations proposed in Securities Release No. 34-63576 (the "Release") for the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). I am specifically responding to the first bulleted item on page 43 and the second full bulleted item on page 51 of the above Release.

I am writing on behalf of the Retirement Board of the AC Transit Employees Retirement Plan. I urge respectfully that the Commission not adopt its proposal to treat appointed members of the governing body of a public retirement system as municipal advisors. It is an unwise public policy and a questionable exercise of rule-making authority to classify any members of public retirement boards as municipal advisors because:

- Members of public retirement boards receive, not provide, investment advice in fulfilling their duties as fiduciaries;
- Public retirement boards are the intended beneficiaries, not the objects, of the protections offered by the Dodd-Frank Act;
- Members of public retirement boards are already accountable to numerous system stakeholders;
- Members of public retirement boards are already subject as fiduciaries to the terms of the pension plans they administer and to numerous state and local regulations;
- Classifying members of public retirement boards as municipal advisors would unnecessarily restrict the pool of pool of qualified volunteers for service on the boards.

Finally, I request that the Commission clarify the definition of "employee of the municipal entity" for the purposes of the exclusion from the definition of municipal advisor so that appointed employee board members come within the exclusion.

Background to the AC Transit Employees Retirement Plan

I serve as legal counsel to the Retirement Board of the AC Transit Employees Retirement Plan (the "Plan"). The Plan, established under Sections 25301-25393 of the Public Utilities Code and by ordinance, is a public defined benefit retirement plan offered to bargaining unit and non-represented employees of AC Transit District. There are approximately 3,200 participants in the Plan. AC Transit, a special-purpose district organized under Sections 24501- 25709 of the California Public Utilities Code, is an Oakland-based regional public transit agency serving the western half of Alameda County and parts of western Contra Costa County in the San Francisco Bay Area. AC Transit also operates "transbay" routes across San Francisco Bay to San Francisco and selected areas in San Mateo and Santa Clara counties. It is not a part of or under the control of the Counties of Alameda or Contra Costa or of any local jurisdictions.

The funds of the Plan are held in trust and are administered by the AC Transit Retirement Board (the "Retirement Board"). District employees are not required or permitted to contribute to the Plan. Payments into the Plan are made by the employer, AC Transit, on behalf of AC Transit employees. Contributions are based on an independent actuary's determination of the amount required annually to fund the Plan's liabilities in an actuarially sound manner, and are used exclusively to provide benefits and to pay the costs of administering the Plan.

Per Section 25361 of the Public Utilities Code, Article VIII of the Plan, and Ordinance No. 10, the Retirement Board is composed of no more than five (5) members. Two members are selected by the AC Transit Board of Directors and are typically outside civic-minded citizens, two members are selected by ATU Local 192, and the fifth member is selected by the AC Transit Board of Directors from employees who are not represented by ATU Local 192. The Retirement Board meets once a month, and delegates the day-to-day operations of the Plan to a Retirement System Manager.

During Retirement Board meetings, each of which are subject to California's open meeting law, each member of the Retirement Board expresses his or her opinion, makes comments, discusses proposed actions and votes on matters before the Retirement Board. The Retirement Board retains independent outside consultants, such as investment managers, investment consultants, actuaries, and attorneys. During their open meetings the members of the Retirement Board routinely and customarily ask questions of these consultants, and rely on their professional advice and reports.

Comments

Under the Commission's interpretation of the statutory definitions of "municipal entity" and "municipal advisor" set forth in the Release, the Plan will constitute a "municipal entity" for the purposes of the Dodd-Frank Act, and members of the Retirement Board will be required to register with the Commission as "municipal advisors."

On behalf of the Retirement Board, I respectfully disagree with the Commission's interpretation of the definitions of "municipal entity" and "municipal advisor," and request that the Commission revise the regulations proposed in the Release for the following reasons:

1. It is Unwise Public Policy and a Questionable Exercise of Rule-Making Authority to Include Public Retirement Plans within the definition of Municipal Entity.

In the Release the Commission interprets the definition of "municipal entity" to include public pension funds. I respectfully contend that Congress did not intend to include public retirement plans within the definition of "municipal entity." The definition, found at Section 15B(e)(8)(B) of the Securities Act, states that a municipal entity is any "plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof..." Congress, however, qualified Section 15B(e)(8)(B) with the following subsection (C) which reads "*or any other issuer of municipal securities.*" This statutory language makes it clear that the legislative intent was that the definition of "municipal entity" only apply to state plans, programs, or asset pools which *also issue municipal bonds or other securities*. The Retirement Board does not issue securities of any kind.

Further, the legislative history of Section 15B of the Securities Act indicates that it was enacted by Congress as part of the Security Acts Amendments of 1975 (the "1975 Amendments") to "create a federal mechanism for the regulation of transactions in [municipal securities] and brokers and dealers and banks in a municipal securities business."[1] Prior to 1975, most of the conduct of municipal securities *professionals* was unregulated because municipal securities were included in the definition of "exempted security" under the pre-1975 version of Section 3(a)(12) of the Securities Act. The Senate Banking, Housing and Urban Affairs Committee described the situation prior to the 1975 Amendments as a "disturbing pattern of *professional* misconduct" that was "characterized by unconscionable mark-ups, churning of customer accounts, misrepresentations concerning the value of municipal securities, disregard of suitability standards, and scandalous high-pressure techniques."[2] (emphasis added)

Public pension boards *which do not issue securities* are not *professionals, brokers or dealers*, and therefore *can not* engage in the activities which Section 15B is intended to regulate.

The legislative history of Section 15B of the Securities Act, when combined with the language of Section 15B, make it clear that public pension funds, local government investment pools and other state and local entities or funds, along with participant-directed investment programs or plans such as Internal Revenue Code Section 529, 403(b) and 457 plans *which do not issue securities*, are the intended *beneficiaries* of the protections afforded by Section 15B of the Securities Act.

2. It is Unwise Public Policy and a Questionable Exercise of Rule-Making Authority to Classify Any Members of Public Retirement Boards as Municipal Advisors because They Receive, Not Provide, Investment Advice in Fulfilling Their Duties as Fiduciaries.

Members of the Retirement Board are either full-time employees of AC Transit, outside citizens, or AC Transit employees on leave with Local 192. Their job responsibilities are separate and distinct from the tasks they perform in their roles as members of the Retirement Board. Members of the Retirement Board do not hold themselves out as having professional or special expertise in "municipal financial products" or "municipal securities," nor is it expected or required that appointed members of the Retirement Board have

[1] See S.Rep. No. 75, 94th Cong., 1st Sess. 3 at 42-43, 1975 U.S. Code Cong. & Admin.News at 182.
[2] See S.Rep. No. 75. 94th Cong., 1st Sess. 3 at 43, 1975 U.S. Code Cong. & Admin.News at 221.

the knowledge, experience, and competence required to provide the type of advice contemplated by the Dodd-Frank Act. Therefore it is necessary as a matter of fiduciary duty for the Retirement Board to hire independent investment managers, investment consultants, actuaries, and attorneys to prepare analyses and report at the regularly scheduled monthly meetings.

The Board possesses a fiduciary duty to manage the investment of the Plan funds. To this end, the Board does not make discrete and discretionary decisions in regard to selecting particular and specific investments. Instead, the Board makes high-level decisions regarding the selection of professional investment managers, asset allocation, and other investment decisions pursuant to requirements of the Retirement Board's pre-established Statement of Investment Objectives and Policy Guidelines. Section V of the Statement of Investment Objectives and Policy Guidelines reads as follows:

> "It is not the intention of the Retirement Board to be involved in day-to-day investment decisions. Assets of the Plan will continue to be allocated with discretion to professional investment managers in a manner consistent with these [Policy Guidelines] investment objectives. Furthermore, when the Retirement Board invests in a separate account with an investment manager, the investment managers shall acknowledge in writing co-fiduciary status."

Members of the Retirement Board function as quasi-legislative or policy decision makers who *rely on, receive, and implement* the advice provided by the Retirement Board independent and professional consultants. Members of the Retirement Board fail to satisfy the definition of "municipal advisor" on its face because they are *recipients* of investment, actuarial, and legal advice, and not the *providers* of such advice.

3. <u>It is Unwise Public Policy and A Questionable Exercise of Rule-Making Authority to Classify Any Members of Public Retirement Boards as Municipal Advisors because Members of Public Retirement Boards are the Intended Beneficiaries of the Protections Offered by the Dodd-Frank Act</u>.

As I detailed under Item 1 above, Section 15B of the Securities Act was added by the 1975 Amendments to regulate the conduct of *professionals* engaged the business of municipal securities.

Individuals who sit on the retirement boards of public pension funds, local government pools and other state and local entities or funds, along with participant-directed investment programs or plans (Code Section 529, 403(b) and 457 plans) are not *professionals, brokers or dealers.* Members of public retirement boards *receive* advice from professional and therefore do *not* engage in the activities which Section 15B is intended to regulate.

The legislative history of Section 15B of the Securities Act, when combined with the plain meaning of "municipal advisor," makes it clear that public pension plans and the pension boards which administer them are the intended *beneficiaries* of the protections afforded by Section 15B of the Securities Act. The Commission's interpretation of the definition of "municipal advisor" should therefore be clarified to state that a "municipal advisor" is an individual who holds himself or herself out as having professional capacity, special knowledge, and expertise in municipal financial and securities matters, and whose advice is expected to and is likely to be relied and acted upon by those who make policy decisions on behalf of a governing body.

4. It is Unwise Public Policy and a Questionable Exercise of Rule-Making Authority to Classify Appointed Members of Public Retirement Boards as Municipal Advisors Because They Are Already Accountable to Numerous System Stakeholders.

It is very important to view accountability issues from the day-to-day perspective of how public retirement boards, such as the Retirement Board, in fact operate. The members of the Retirement Board, as well as all California public retirement boards, are subject to an extensive and evolving mosaic of concrete oversight and accountability. Public retirement boards, such as the Retirement Board, are subject to keen and on-going employee scrutiny; plan sponsor scrutiny; scrutiny by taxpayers and transit riders; and scrutiny by the local press. Civil grand juries can and have been convened to review the workings and operations of public retirement boards, such as the Retirement Board. Board meetings are open; agendas of the time and place of the meetings must be posted in advance of the meetings as a matter of state law; and members of the public, including members of the press and members of the employee organizations that represent plan participants, can easily attend the Retirement Board's open meetings.

5. It is Unwise Public Policy and a Questionable Exercise of Rule-Making Authority to Classify Appointed Members of Public Retirement Boards as Municipal Advisors Because They Are Already Subject as Fiduciaries to the Terms of the Plan and to Numerous State and Local Regulations.

Public Utilities Code Section 25392 prohibits members of the Retirement Board from having an indirect or direct interest in making of any investment. Sections 8 and 9 of Ordinance No. 10 state that Retirement Board members cannot have any financial interest in any Retirement Board decisions, and that the Retirement Board shall comply with the California Pension Protection Act. Further, Section 7.1 of the Plan states that Retirement Board members are named fiduciaries of the Plan.

In addition to the fiduciary and general trust responsibilities imposed by the California Public Utilities Code, Plan document, Ordinance No. 10, and the Statement of Investment Objectives and Policy Guidelines, Retirement Board members are also subject to an extensive array of state laws:

- The California Pension Protection Act (California Constitution, Article 16, Section 17). This provision of the California Constitution was enacted by the people of California through the initiative process in 1992 and imposes a strict set of fiduciary duties and requirements upon public retirement boards. California public retirement boards as a matter of constitutional mandate are thus to administer the retirement plan solely in the interest of plan members, retirees, and beneficiaries. The Act also imposes upon board members ERISA's prudent person standard.
- The Ralph M. Brown Act (California Government Code 54950, et. seq.). The Brown Act requires open public meetings, pre-published meeting agendas, published minutes, and public participation. Violations of the Brown Act are punishable by criminal penalties and civil remedies.
- California Government Code Section 1090 ("Section 1090"). Section 1090 prohibits a board member from being involved in a contract in which the member has a financial interest. California courts for decades have liberally interpreted the provisions of Section 1090. If the member is found to have willfully violated GC Section 1090, he or she can be criminally prosecuted. (See, for example, *Lexin v. Sup. Ct. 47 Cal. 4th 1050*)
- The California Public Records Act. The Public Records Act gives the public access to all communications related to public business in the possession of public agencies, such as the

Retirement Board. Individuals denied access to public information may sue to enforce their rights to the information and, if successful, can recover their costs and legal fees.

- The California Political Reform Act. The Political Reform Act requires board members to publicly disclose their private economic interests and requires board members to disqualify themselves from participating in decisions in which they have a financial interest. The Political Reform Act also limits or prohibits the receipt of specified gifts and honoraria.

As you can see, it would be incorrect to suggest that the appointed members of the Retirement Board are not directly accountable to the participants in the plan and to the AC Transit District simply because they have not been elected. Members appointed to the Retirement Board are subjected to significant deterrence to misconduct in the form of state ethics and other laws and common law responsibilities which include potential financial and criminal penalties. Each of these statutory controls satisfies the Commission's stated intent of protecting the public.

6. It is Unwise Public Policy and a Questionable Exercise of Rule-Making Authority to Classify Appointed Members of Public Retirement Boards as Municipal Advisors Because to do so Would Restrict the Pool of Qualified Volunteers for Service on the Boards.

The personal cost and burden of complying with the registration requirements of the Dodd-Frank Act as interpreted in the Release will be onerous for appointed members of the Retirement Board. Having to register at all, much less with the both SEC and the MSRB, is at best counterproductive.

For example, Form MA-1, the municipal advisor registration form, is nearly 30 pages long and appears to require the assistance of an attorney or other individual with extensive experience in federal securities law to complete. In addition, Form MA-1 requires the registrant to provide a significant amount of personal information which will be made available to the public. Appointed members of the Board of Pensions will be personally responsible for costs of completing Form MA-1, as well as for the costs complying with the other registration requirements. Because they serve voluntarily on the Retirement Board. Further, Public Utilities Code Section 25362 and Ordinance No. 10 clearly state that members of the Retirement Board cannot receive compensation for the service as Retirement Board members, including presumably the costs of complying with the proposed registration requirement.

In addition, the MSRB currently charges an initial fee of $100 to register, and a $500 annual fee thereafter. Again, these costs will have to be paid by the individual members of the Retirement Board.

Unless appointed board members, whether employee or outside citizen, are excluded the burdens of complying with the registration requirements, and exposure to federal liability in addition to state liability will act as a very significant disincentive to serve on the Retirement Board.

7. It is Important to Clarify in the Final Rule that the Following Individuals Who Sit on A Public Retirement Board Come Within the Exclusion for "Employees of Municipal Entity": (1) Employees of the Municipal Entity Which Sponsors the Pension Plan; (2) Employees of the Municipal Entity Which Sponsors the Pension Plan Who Are Appointed by the Employer or Appointed by the Unions Representing Employees of the Employer ; and (3) Employees of a Union That Represents Employees of the Municipal Entity and Who Are Appointed by the Union.

I note that Section 925 of the Release states that "an employee of a municipal entity" will not be a "municipal advisor." Neither the Dodd-Frank Act nor the Release clarify whether the exclusion applies to (1) employees of the municipal entity; (2) employees of the municipal entity who are appointed by the municipal entity or appointed by the unions representing employees of the municipal entity; or (3) employees of a union that represents employees of the municipal entity and who are appointed by the union.

There should be no distinction made between members of the Retirement Board, as each member of the Retirement Board is subject to the same stakeholder scrutiny and state laws, and shares the very same fiduciary duty to the Plan and the same mandate to act exclusively in the interest of Plan participants. Imposing a system which subjects some members of the Retirement Board to increased compliance requirements and liability will undermine the ability of the Retirement Board to carry out the responsibilities assigned to it by the terms of the Plan.

Conclusion

The Retirement Board supports the Commission's effort to improve the quality of financial advice provided to municipal entities and their pension plan boards, and the ethics and qualifications of the individuals providing such advice through its implementation of the Dodd-Frank Act. However, including appointed members of public pension plan boards in the definition of "municipal advisor" will not advance the Commission's objectives. Appointed members of public retirement boards simply do not have the professional knowledge or expertise to provide the advice contemplated by the Dodd-Frank Act. Further, they do not provide advice – they receive it. Appointed members are already subjected to potential financial and criminal liability under state law. Finally, the additional time, expense, disclosure, recordkeeping, and exposure to potential liability under the Dodd-Frank Act will make it increasingly difficult to recruit qualified individuals to serve as members of public retirement boards.

I welcome any questions you may have regarding my comments.

Sincerely,

Russell L. Richeda

AC Transit
Employees' Retirement System

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February 18, 2011

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

Dear Chair Schapiro and Members of the Commission,

I am writing to comment on the regulations proposed in Securities Release No. 34-63576. Attached to my letter you will find a letter from our attorney that details the concerns of the Board.

My primary concern is that by classifying public members of a retirement board as municipal advisors you will make it more difficult for AC Transit to recruit public members to the retirement board. I am also concerned that the proposed regulation may cause one or more of our public members to resign from the Board.

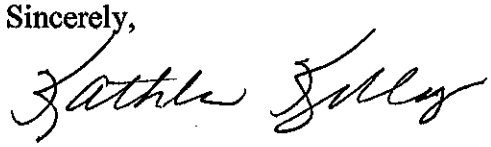
Every two years the AC Transit District Board appoints two public members to the AC Transit Retirement Board. These individuals are not compensated for the approximately 7-10 hours a month they devote to activities related to the retirement board. It is not easy for the AC Transit Board to recruit public members to the retirement board and in the most recent recruitment only three individuals applied for the two open positions. In recent years we have had anywhere from two to five applicants for the public positions. I am concerned that the proposed regulation will result in fewer individuals expressing interest to serve on the retirement board which in turn will result in less qualified board members being appointed.

Board members are fiduciaries and covered by a host of state and local laws so adding an additional layer of SEC regulation to the public members will be counterproductive. It will actually provide very little oversight while having the unintended consequence of discouraging public members from serving on public retirement boards. I don't believe this is the intent of the SEC.

Like all committed individuals who sit on a retirement board I favor steps that will improve the governance of public retirement boards; however, I feel this latest attempt by the SEC will not accomplish this objective and might even have the opposite effect.

Please feel free to contact me if you have any questions.

Sincerely,



Kathleen Kelly
AC Transit Employees' Retirement Board Member