

February 22, 2011

Via E-mail: rule-comments@sec.gov

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: Comments to Proposed Rules Regarding Registration of Municipal Advisors,
SEC Release No. 34-63576; File No. S7-45-10

Dear Ms. Murphy:

The following comments are submitted to the Securities and Exchange Commission (the "SEC") by the **UNIVERSITY OF PITTSBURGH – OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION** ("Pitt"), **LINCOLN UNIVERSITY – OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION** ("Lincoln"), **THE PENNSYLVANIA STATE UNIVERSITY** ("Penn State") and **TEMPLE UNIVERSITY – OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION** ("Temple," and together with Pitt, Lincoln and Penn State, the "Universities," and each individually, a "University") relating to SEC Release No. 34-63576 (the "Release"). The Release proposes Rules 15Ba1-1 through 15Ba1-7 (the "Proposed Rules") to be issued by the SEC pursuant to Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") to, among other things, implement permanent registration requirements for municipal advisors with the SEC. While we concur with the comments provided to the SEC by the Association of Governing Boards of Universities and Colleges and the Board of Regents for the Oklahoma State University and Agricultural and Mechanical Colleges pertaining to the Proposed Rules, we regard this issue of such importance that it bears separate comment.

Each University is an instrumentality of the Commonwealth of Pennsylvania and a governmental issuer of municipal securities. Therefore, the Universities are "municipal entities" for purposes of the Proposed Rules. Each University is a "state-related" institution in Pennsylvania's Commonwealth System of Higher Education governed by separate boards of trustees. While the board composition of each University varies, each board is constituted in part by *ex officio* elected officials, *ex officio* members who do not hold elective office, members appointed by certain elected officials, and members elected to the boards pursuant to the respective University's bylaws (but not by the public electorate). There are also non-voting *ex officio* trustees, emeriti trustees and other non-voting special board members. In addition, certain committees of the boards also include non-voting committee members, representing members of the public, alumni, faculty, staff and student bodies. For more information as to the specific board composition of each University, please see Exhibit A attached hereto and incorporated herein.

Definition of Municipal Advisor

Pursuant to §240.15Ba1-1(d)(1) of the Proposed Rules, the term “municipal advisor” has the same meaning as set forth in Section 15B(e)(4) of the Securities Exchange Act of 1934 (the “Exchange Act”), which reads, in part:

- “(A) means a person (who is not a municipal entity or an employee of a municipal entity) that –
- (i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or
 - (ii) undertakes a solicitation of a municipal entity;”

The SEC in its discussion of the Proposed Rules has indicated that the exclusion from the definition of a “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 an elected member of the governing body of the municipal entity. The SEC also expressed the opinion that it does not believe that appointed members of a governing body of a municipal entity that are not elected *ex officio* members should be excluded from the definition of a “municipal advisor.” Further, the SEC asserts that this distinction is appropriate by stating that employees and elected members are accountable to the municipal entity for their actions, but that appointed members are not accountable for their performance to the citizens of the municipal entity.¹

The Proposed Rules, if promulgated as presently contemplated by the SEC, would impose registration requirements based on an arbitrary classification of board membership status (i.e., elected or appointed, employee or non-employee) instead of focusing on the nature of the services being rendered by such persons to the municipal entity. For the reasons set forth below, we strongly urge the SEC to exclude from the definition of “municipal advisor” all persons affiliated with the municipal entity, whether such individuals are serving as trustees, directors, committee members, advisory board members, officers, employees, or volunteers so long as such persons are acting solely within the scope of such relationship to the municipal entity.

I. Application of the Proposed Rules to the boards of our Universities will have a disparate impact on individual board members without any rational basis therefor.

Of the Universities’ board members, only the Governor of Pennsylvania, the Mayor of the City of Pittsburgh, Pennsylvania, the Mayor of the City of Philadelphia, Pennsylvania and the Chief Executive of Allegheny County, Pennsylvania are serving as *ex officio* members by virtue of holding an elective office, and therefore would have the benefit of the Proposed Rules’ exclusion from the definition of “municipal advisor.” Other *ex officio* members serve by virtue of holding cabinet-level government appointments or executive positions within the Universities, but are not elected to their official positions by the public. All remaining members have been appointed or elected by the boards pursuant to their respective bylaws, and none are elected by the public. The Proposed Rules’ distinction between elected and appointed members

¹ 76 Fed. Reg. 834 (Jan. 6, 2011).

is inappropriate for municipal entity issuers such as the Universities, for which, unlike states or municipalities, governing body members are not "elected" by the public electorate. If the SEC does not broaden its exclusion to cover all members of our boards, then the Secretary of the Pennsylvania Department of Education, the Secretary of the Pennsylvania Department of Conservation and Natural Resources, and the Secretary of the Pennsylvania Department of Agriculture would have to register with the SEC as municipal advisors. More importantly, with the exception of those few *ex officio* members that are employees of the Universities, all of our remaining board members and most likely a vast number of committee members, including community and student representatives, would also have to register with the SEC as municipal advisors.

The registration requirements, including the related expense and potential federal securities law liability, would undoubtedly cause current board members to consider resigning, and would certainly have a "chilling effect" on the recruitment of private citizens to serve as board members. The Proposed Rules will particularly dissuade potential board members with useful finance and investing backgrounds from joining our boards. Such a result would be severely detrimental to the governance practices of the Universities, would serve no public purpose, and would undermine the Universities' interest in promoting citizen participation on their boards.

II. Consideration Should be Given to the Nature of Services Rendered by Board/Committee Members

In the Release, the SEC describes three primary categories of municipal advisors to be regulated. They are: (1) financial advisors, (2) investment advisors, and (3) third-party marketers and solicitors. The comments go on to describe these groups as "*distinct groups of professionals that offer different services and compete in distinct markets.*"² Clearly, the board/committee members of our Universities, while acting in their capacities as such, do not fall into any of the described categories.

Our boards and committees thereof serve as deliberative bodies with authority and responsibility for the governance and welfare of their respective Universities. In connection with managing their oversight responsibilities, various finance, budget, investment and similar committees of the Universities' boards may review, recommend and approve certain courses of action with respect to the issuance of municipal securities, use of municipal derivatives, and a number of other related financial and investment matters. However, these actions are undertaken by the board/committee members solely in their fiduciary capacities as board/committee members of the Universities. The SEC should interpret this advice as being made "*within*" and not "*to or on behalf of*" the Universities. As such, these board/committee members should be viewed simply as part of the "municipal entity" similar to employees and they should not be deemed to be "municipal advisors" for purposes of the Proposed Rules.

If the Proposed Rules are left unchanged or revised as currently proposed by the SEC, our boards' primary functions – deliberation, voting and exercising their fiduciary duties – will become regulated activities. Those activities are not the typical activities of a *professional municipal advisor*, and such regulation is well beyond the scope of the Congressional authority under which the Proposed Rules were written.

² 76 Fed. Reg. 829 (Jan. 6, 2011).

The SEC in its comments has indicated that it does not believe that whether a municipal advisor is compensated for providing municipal advice should factor into the determination regarding whether the municipal advisor must register. However, the SEC has raised the question whether there are any persons who engage in uncompensated "municipal advisory activities" that should be excluded from the definition of "municipal advisor." Compensation for the rendering of municipal advisory services should be an important consideration in determining who must register as a municipal advisor.

In this regard, we recommend that the SEC carefully consider and adopt a similar framework of definitions and exemptions as those which currently exist under the Securities Act of 1933 (the "Securities Act"), the Exchange Act, Investment Advisers Act of 1940 (the "Advisers Act"), the Investment Company Act of 1940 (the "Investment Company Act"), and the rules and regulations promulgated thereunder. Specifically,

- The term "investment adviser" as defined in the Advisers Act means "any person who, *for compensation, engages in the business of advising others ...*" (emphasis added).
- The term "investment adviser" as defined in the Investment Company Act means "any person (*other than a bona fide officer, director, trustee, member of an advisory board, or employee of such company as such*) who pursuant to contract with such company *regularly furnishes advice to such company ...*" (emphasis added).
- The term "broker" as defined in the Exchange Act means "any person *engaged in the business of effecting transactions in securities for the account of others*" (emphasis added).
- Under Rule 240.3a4-1, *an associated person of an issuer of securities* shall not be deemed to be a broker solely by reason of his participation in the sale of the securities of such issuer if the associated person, among other things, *is not compensated* in connection with his participation by the payment of commissions or other remuneration based either directly or indirectly on transactions in securities (emphasis added).
- The term "dealer" as defined in the Exchange Act means "any person *engaged in the business of buying and selling securities for such person's own account through a broker or otherwise*" (emphasis added). As provided as an exception to the definition of "dealer," the term "dealer" does not include "a person that buys or sells securities for such person's own account, either individually or in a fiduciary capacity, *but not as a part of a regular business*" (emphasis added).
- The term "investment supervisory services" as defined in the Advisers Act means the "*giving of continuous advice* as to the investment of funds on the basis of the individual needs of each *client*" (emphasis added).
- Under Rule 203(b)(3)-1(b)(4), an investment adviser is not required to count as a client any person for whom an investment adviser provides investment advisory services *without compensation*.
- Pursuant to Section 203(a) of the Advisers Act, it is unlawful for "any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of

interstate commerce *in connection with his or its business as an investment adviser*" (emphasis added).

Based on the foregoing examples, the most consistent approach to registration, regulation and ongoing supervision would be to require those persons *who are regularly engaged in the business of providing municipal advisory activities to municipal entity clients* to register as a "municipal advisor." Presumably, to be regularly engaged in the business, such persons would be undertaking such activities for compensation either directly or indirectly.

Only those board members regularly engaged in the business of providing municipal advisory services, who are specifically engaged by a municipal entity to provide it with municipal advisory services (separate and apart from their board positions) should be required to register as municipal advisors.

III. Existing Fiduciary Duty and Accountability

As noted by the SEC, the Exchange Act, as amended by the Dodd-Frank Act, grants the Municipal Securities Rulemaking Board ("MSRB") regulatory authority over municipal advisors and imposes a fiduciary duty on municipal advisors when advising municipal entities.³ Presumably, the distinction that the SEC is attempting to make in its exclusions from registration between elected and appointed board members is related to a perceived lack of fiduciary duty or accountability by certain board members to the citizens of the municipal entity.

Although the Universities' board members are not elected by the citizens of the communities, the citizens have notice of and the right to attend all meetings at which official "agency business" is to be acted upon. The General Assembly of the Commonwealth of Pennsylvania has found the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formulation and decisionmaking of agencies to be vital to the enhancement and proper functioning of the democratic process. Pursuant to Pennsylvania's Sunshine Act,⁴ official action and deliberations by a quorum of the members of an agency must take place at a meeting open to the public, unless otherwise specifically excepted by law. As state-related universities, the boards of trustees and all committees thereof authorized to take official action or render advice on matters of University business are deemed to be an "agency" of the Commonwealth for purposes of the Sunshine Act. Accordingly, all deliberations and official actions taken by the Universities' boards of trustees relating to the issuance of municipal securities, including the structure, timing, terms, and other similar matters, are held in open meetings with full disclosure and transparency.

Furthermore, each year the chief executive officer of each University is required by Pennsylvania law to make a report of all of the activities of the University, instructional, administrative and financial, for the preceding scholastic and fiscal year to its respective board of trustees, who then transmits the same to the Governor and to the members of the General Assembly. As such, the Universities and their boards provide a full accounting to elected officials of the Commonwealth of Pennsylvania.

³ See footnotes 59 and 60, 76 Fed. Reg. at 827-828 (Jan. 6, 2011).

⁴ 65 Pa.C.S.A. §701 et seq.

Elizabeth M. Murphy
February 22, 2011
Page 6

With respect to the operations of each University's board, there is no meaningful distinction between elected or appointed members in terms of the members' legal and fiduciary obligations to the Universities they serve. All of the board members stand in a fiduciary relationship to the Universities they serve, and they are required to perform their duties as a trustee, in good faith, subject to a duty of care established under Pennsylvania law. An additional layer of fiduciary duty applicable to some, but not all, board members solely because a board member is appointed or not elected by the general public is completely arbitrary and unnecessary.

For the reasons described above, we strongly urge the SEC to exclude from the definition of "municipal advisor" all persons affiliated with the Universities (or any other municipal entity), whether such individuals are serving as trustees, directors, committee members, advisory board members, officers, employees, or volunteers, so long as such persons are acting solely within the scope of such relationship to the Universities (or other municipal entity).

Respectfully,

UNIVERSITY OF PITTSBURGH --
OF THE COMMONWEALTH SYSTEM
OF HIGHER EDUCATION

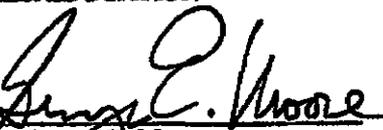
THE PENNSYLVANIA STATE UNIVERSITY

By: 
Name: Jerome Cochran
Title: Executive Vice Chancellor and
General Counsel

By: 
Name: Cynthia A. Baldwin
Title: Vice President and General Counsel

TEMPLE UNIVERSITY -- OF THE
COMMONWEALTH SYSTEM OF
HIGHER EDUCATION

LINCOLN UNIVERSITY -- OF THE
COMMONWEALTH SYSTEM OF
HIGHER EDUCATION

By: 
Name: George E. Moore
Title: Senior Vice President,
University Counsel and Secretary

By: _____
Name: Ivory V. Nelson, Ph.D.
Title: President

Elizabeth M. Murphy
February 22, 2011
Page 6

With respect to the operations of each University's board, there is no meaningful distinction between elected or appointed members in terms of the members' legal and fiduciary obligations to the Universities they serve. All of the board members stand in a fiduciary relationship to the Universities they serve, and they are required to perform their duties as a trustee, in good faith, subject to a duty of care established under Pennsylvania law. An additional layer of fiduciary duty applicable to some, but not all, board members solely because a board member is appointed or not elected by the general public is completely arbitrary and unnecessary.

For the reasons described above, we strongly urge the SEC to exclude from the definition of "municipal advisor" all persons affiliated with the Universities (or any other municipal entity), whether such individuals are serving as trustees, directors, committee members, advisory board members, officers, employees, or volunteers, so long as such persons are acting solely within the scope of such relationship to the Universities (or other municipal entity).

Respectfully,

UNIVERSITY OF PITTSBURGH -
OF THE COMMONWEALTH SYSTEM
OF HIGHER EDUCATION

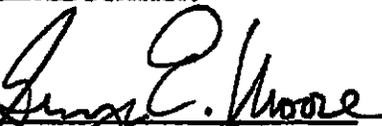
THE PENNSYLVANIA STATE UNIVERSITY

By: 
Name: Jerome Cochran
Title: Executive Vice Chancellor and
General Counsel

By: _____
Name: Cynthia A. Baldwin
Title: Vice President and General Counsel

TEMPLE UNIVERSITY - OF THE
COMMONWEALTH SYSTEM OF
HIGHER EDUCATION

LINCOLN UNIVERSITY - OF THE
COMMONWEALTH SYSTEM OF
HIGHER EDUCATION

By: 
Name: George E. Moore
Title: Senior Vice President,
University Counsel and Secretary

By: 
Name: Ivory V. Nelson, Ph.D.
Title: President

Pitt's Board of Trustees

Pitt's Board of Trustees is composed of 36 voting members consisting of Pitt's Chancellor and Chief Executive Officer; 17 Term Trustees elected by the board; six Alumni Trustees elected by the board from nominations from the Pitt Alumni Association; and 12 Commonwealth Trustees, four each appointed by the Governor, the President Pro Tempore of the Pennsylvania Senate and the Speaker of the Pennsylvania House of Representatives. The board also includes the Governor of Pennsylvania, the Secretary of the Pennsylvania Department of Education, the Allegheny County Executive, and the Mayor of the City of Pittsburgh, all four of whom are non-voting, *ex officio* members of the board. In addition, there is a class of 16 Special Trustees elected by a voting majority of the board in accordance with Pitt's bylaws. Special Trustees may attend all meetings of the board and are entitled to and exercise all rights, responsibilities, and privileges of trusteeship, except the right to vote at board meetings. Emeritus Trustees, of which there are currently 30 and are elected for life, may also attend board meetings but do not have voting privileges.

Temple's Board of Trustees

Temple's Board of Trustees consists of 36 voting members. Twelve trustees are designated Commonwealth Trustees, four of whom are appointed by the Governor with the advice and consent of the Pennsylvania Senate, four of whom are appointed by the President Pro Tempore of the Senate, and four of whom are appointed by the Speaker of the Pennsylvania House of Representatives. The other 24 Trustees are elected by a majority of the voting members of the board then in office in accordance with Temple's bylaws. The board also includes the Governor of Pennsylvania, the Secretary of the Pennsylvania Department of Education, and the Mayor of the City of Philadelphia, all three of whom are non-voting, *ex officio* members of the board.

Lincoln's Board of Trustees

Lincoln's Board of Trustees consists of 39 voting members. Eighteen members are designated University Trustees, of whom at least three shall be graduates of Lincoln University, and shall be elected by members of the board. One of the 18 University Trustees shall be a student representative elected by the student body. Twelve members are designated Commonwealth Trustees, four of whom are appointed by the Governor with the advice and consent of the Pennsylvania Senate, four of whom are appointed by the President Pro Tempore of the Senate, and four of whom are appointed by the Speaker of the Pennsylvania House of Representatives. Six members are Alumni Trustees elected by the board from nominations submitted by the Alumni Association. The board also includes the President of Lincoln, the Governor of Pennsylvania and the Secretary of the Pennsylvania Department of Education, all three of whom are voting, *ex officio* members of the board. Emeritus Trustees may sit with the board at all regular or special meetings but shall have no vote. Honorary Trustees may sit with the board at all regular or special meetings but shall have no vote and shall not be more than four in number at any given time.

Penn State's Board of Trustees

Penn State's Board of Trustees is composed of 32 voting members and one non-voting member consisting of the President of Penn State, six members appointed by the Governor, nine members elected by alumni, six members elected by delegates from organized agricultural societies within the Commonwealth, and six members elected by the board representing business and industry endeavors in accordance with Penn State's bylaws. The board also includes the Governor of Pennsylvania, the Secretary of the Pennsylvania Department of Education, the Secretary of the Pennsylvania Department of Conservation and Natural Resources, and the Secretary of the Pennsylvania Department of Agriculture, all four of whom are voting, *ex officio* members of the board.