

February 22, 2011

Sent via email to: rulecomments@sec.gov

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"). We are 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 Board of Administration of the Federated City Employees Retirement System (City of San Jose, CA) to 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 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, we 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 board members who are employees of the plan sponsor come within the exclusion.

Background to the City of San Jose Federated City Employees' Retirement System

I serve as the Chair of the Board of Administration for the Federated City Employees' Retirement System (the "FCERS" or "System"). The System is a public defined benefit retirement plan, enacted under the City of San Jose Charter and Chapter 3.28 of the City of San Jose Municipal Code. Participation in the System, which has approximately 7,700 participants, is mandatory for most full-time employees of the City of San Jose.

The funds of the System are held in trust and are administered by the Board of Administration. Employees make pre-tax contributions to the System. The City makes contributions to the System on behalf of employees based on an independent actuary's determination of the amount required annually to fund the Plan's liabilities in a sound manner. Contributions are used only for the purpose of funding the vested and unvested liabilities of the Plan.

Per Sections 2.08.1000-2.08.1090 and Sections 3.28.100-3.28.208 of the City of San Jose Municipal Code, as amended, the System is administered by a seven (7) member Board of Administration. Per Section 2.08.1010 of the Municipal Code, two (2) of the Board trustees are active employee members of the system, selected by the City Council after an advisory vote by City employees. One (1) Board trustee is a retired member of the System, selected by the City Council after an advisory vote by System retirees. Four (4) Board trustees are members of the public not connected with the City government or the System. The public members are required to have significant experience and education in matters relevant to service as trustees of a pension fund and are required to satisfy one of the following: (1) be a management level employee of a bank, insurance company, savings and loan company, credit union or trust company, or (2) serve in an active or advisory capacity as to investment of institutional or endowment funds or, (3) hold a relevant investment-related position in the public or private sector.

All Board meetings are subject to California's open meeting law. Each member of the Board acts in a fiduciary capacity when participating in discussion and voting on matters that come before the Board. The Board retains independent outside consultants, such as investment managers, investment consultants, actuaries, and attorneys. During their open meetings the Board members routinely and customarily ask questions of these consultants, and rely on their professional advice and reports, as well as the advice and expertise of City of San Jose employees who serve as staff to the Board.

Comments

Under the Commission's proposal as set forth in the Release, the System would constitute a "municipal entity" for the purposes of the Dodd-Frank Act, and appointed members of the Board would be required to register with the Commission as "municipal advisors."

We respectfully disagree with the Commission's proposal and we request that the Commission's final regulations recognize that all municipal pension plan trustees, regardless of the manner in which they may come to serve on a pension plan board, should not be considered or treated as "municipal" for the following reasons:

1. 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.

Two of the System Board members are full-time employees of the City of San Jose, and their job responsibilities are separate and distinct from the tasks they perform in their roles as Board members. One of the System Board members is a retired City of San Jose employee. City of San Jose employee/retiree Board members 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 employee/retiree Board members have the knowledge, experience, and competence required to provide the type of advice contemplated by the Dodd-Frank Act.

The remaining four members are civic minded citizen volunteers with significant experience and education in matters relevant to service as trustees of a pension fund. However, the citizen Board members are not principally *engaged in the business of municipal securities or products* and do not utilize any investment knowledge that they may have to make discrete recommendations or to provide advice regarding specific investments or investment plans. Further, they receive only a small stipend (\$150 per meeting) for serving on the Board, even though they are required to dedicate significant time to Board business.

Each member of the Board possesses a fiduciary duty to prudently make decision concerning the investment of System funds. During the monthly Board meetings, Board members do 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 pre-established investment policies in the San Jose Municipal Code and adopted Resolutions. The Board retains independent investment managers, investment consultants, actuaries, and attorneys to prepare analyses and report at the regularly scheduled monthly meetings.

Both the employee and citizen members of the Board of Administration function as quasi-legislative or policy decision makers who *rely on, receive, and implement* the advice provided by the independent and professional consultants hired by the Board of Administration. The appointed employee and citizen members of the Board of Administration 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.

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 Members of Public Retirement Boards are the Intended Beneficiaries of the Protections Offered by the Dodd-Frank Act.

As we 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 while acting in their role as board members *professionals directly engaged in the business of municipal securities or products, brokers or dealers*. Members of public retirement boards *receive* advice from professionals 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 *provided to* a governing body, and is expected to and is likely to be relied and acted upon by those *who make policy decisions on behalf of* a governing body.

3. 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 System Board, in fact operate. The members of the System Board, as well as all public pension plan boards are subject to an extensive and evolving mosaic of concrete oversight and accountability. Public retirement boards are subject to keen and on-going employee scrutiny; plan sponsor scrutiny; scrutiny by taxpayers; 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 System Board. System 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 Boards’ open meetings.

4. It is Unwise Public Policy and A Questionable Exercise of Rule-Making Authority to Classify Any Appointed Members of Public Retirement Boards as Municipal Advisors Because They Must Already Act as Fiduciaries and are Subject to Numerous Federal, State and Local Regulations.

The existing federal fiduciary duty requirements of public pension plan board trustee are derived from the U.S Constitution (contracts clause) and the Internal Revenue Code. In addition, to these existing Federal fiduciary and general trust responsibilities, System trustees have fiduciary duties under the San Jose Municipal Code and City of San Jose Charter, and are also subject to regulation under an extensive array of state laws. It is our understanding that pension plan boards in other states are subject to regulations similar to the following California provisions:

- 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 required 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 Board of Administration. 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 can be seen, it would be incorrect to suggest that the appointed members of the Board of Administration are not directly accountable to the participants in the plan and the City of San Jose simply because they have not been elected. Members appointed to the Board of Administration are thus 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.

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 to do so Would Unnecessarily 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 Board of Administration. 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 Administration 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 Board of Administration and are prohibited from receiving compensation for service.

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 Board of Administration.

Unless board members who are appointed from the ranks of city employees, retirees and civic-minded citizens are excluded from the definition of municipal advisors, 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 Board of Administration.

6. 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 and of the Municipal Entity Which Sponsors the Pension Plan Who Are Appointed by the Employer.

We note that Section 925 of the Release states that "an employee of a municipal entity" will not be a "municipal advisor." The Release does not seem to address whether, in the context of a public retirement board, the exclusion applies to employees of the municipal entity who do not sit on a board as part of their usual job duties, but instead are appointed by the municipal entity through a process separate from their employment.

As noted above, two of the members of the Board of Administration are employees of the City of San Jose. For the reasons stated above, we respectfully urge the Commission to clarify that these categories of appointed members of public retirement board are excluded from the definition of municipal advisor.

Conclusion

We support 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 employee/retiree members of public retirement boards simply do not have the professional knowledge or expertise to provide the advice contemplated by the Dodd-Frank Act. Appointed citizen-members of public retirements may possess this type expertise, but not necessarily to the level contemplated by the Act. Moreover, these individuals provide their expertise on a volunteer basis and engage in the same high-level administrative decision making as the employee/retiree members. Further, neither the employee/retiree members nor the citizen members of the Board of Administration 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 the Board of Administration.

We welcome any questions you may have regarding my comments.

Sincerely,



Matthew Loesch, Chair

Board of Administration of the Federated City Employees Retirement System