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February 22, 2011

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0690

RE: Registration of Municipal Advisors, Proposed Rule
File Number S7-45-10, Release No. 34-63576, 76 Fed. Reg. 824

Dear Ms. Murphy:

In response to the Commission's request for comments on its Proposed Rule for the registration of municipal advisors, we write after much counsel and deliberation with concern for the best interests of the 185,000 state and local public employees that the Utah Retirement Systems ("URS") serves, by way of our defined benefit pension, 401(k) and 457 plans. We urge you to consider our arguments, as outlined below, that neither Congress intended, public policy demands, nor fairness or efficiency in the markets require that the Commission maintain its proposal to subject public plan board members, whether elected or appointed, to further regulation as municipal advisors.

I. Municipal entities' boards of trustees are an inseparable legal part of the entities they serve and are expressly exempt from the Exchange Act's definition of "municipal advisor."

We can appreciate the Commission's proposal to accommodate elected and ex officio board members within the employee exception of the definition of municipal advisor, but do not believe this analysis is necessary, nor is it the most appropriate way to view the relationship between a board of trustees and the entity it serves. A public plan's board of trustees is an inseparable and vital part of the plan's legal organization; as a trust is not a trust without a trustee, our plan is incomplete without its board of trustees. We respectfully urge the Commission to consider that boards of municipal entities which are legally inseparable from the municipal entity are a part of that municipal entity for purposes of 15 U.S.C. §78o-4(e)(4)(A), which excepts municipal entities from the definition of "municipal advisor."

Consider the result if municipal entity boards are not considered inclusive in the definition of "municipal entity." If the governing body of a municipal entity, as a whole, is not part of the "municipal entity," then any third party soliciting or providing advice to the governing body with respect to municipal financial products or the issuance of municipal securities would not be subject to any of the provisions or registration requirements of Exchange Act Section 15B. It is clear this was not Congress' intent. Given

that, there is no basis for believing that the governing body of a municipal entity is excluded from the term "municipal entity" as used in 15 USC §78o-4(e)(4)(A).

Principles of board governance and procedure eliminate the necessity for any look-through of the board to its individual members or the need to distinguish between appointed or elected members. Boards make decisions by resolution passed by vote or consensus as a body, not as individuals. For this reason, we believe it is not appropriate that the definition of "municipal advisor" consider the individual nature of any single board member or question how he or she arrived at this position of public service. This question is irrelevant if the board as a complete body must provide ultimate advice; no single individual can direct any plan action or provide advice unsusceptible to board dissent, debate or rejection.

We believe that the soundest reflection of Congressional intent and the most appropriate implementation of the Dodd-Frank Act amendments is to clarify that governing boards of municipal entities that are legally inseparable from the entity be considered a "municipal entity" for purposes of 15 USC §78o-4(e)(4)(A).

II. Even if public plan boards are not exempt from the definition of "municipal advisor" by virtue of being an inseparable legal part of the municipal entity they serve, public policy still demands that appointed board members be afforded the same exemption as elected and ex officio board members.

We believe that the Commission's proposal to extend the employee exemption to elected and ex officio board members is supported by public policy, but the distinction between elected and appointed board members is not. We must respectfully disagree with the Commission's conclusions that only "employees and elected members are accountable to the municipal entity for their actions." We believe there is ample explanation to resolve the Commission's stated concern that "appointed members, unlike elected officials and elected ex officio members, are not directly accountable for their performance to the citizens of the municipal entity."

The Commission's claim that appointed board members "are not directly accountable for their performance" assumes that reelection is the only sufficient regulator. To the contrary, appointed board members are often distinguished public figures subject to the same public scrutiny as elected officials with as much or more at stake for their public reputation. In the case of the Utah Retirement Systems, Utah state law requires that, of the seven members, one is the state treasurer (elected ex officio), four are investment or banking professionals appointed by the governor (purely "appointed" under the Commission's proposed reasoning), and the remaining two members are appointed by the governor only *after receiving a minimum number of nominations from the governing bodies of their representative public industry associations* (the school employees' association and the public employee association, respectively) (Utah Code § 49-11-202(1)). Under the Commission's proposed rule, it is unclear whether these latter two members would be afforded the ex officio/employee exemption, although they clearly meet the accountability test that the Commission uses to distinguish elected and ex officio members from purely appointed board members.

We further disagree with the Commission's opinion that appointed members are not directly accountable to the citizens of the municipal entity because they are also statutorily and contractually responsible as fiduciaries to the municipal entity. Appointed and elected board members alike owe strict fiduciary duties to the plans they serve, and these duties carry both financial and professional liabilities greater than the liability of public scrutiny (and greater than the threat of termination, which is itself considered sufficient to exempt employees from being "municipal advisors"). Specifically, for the members of our board, the fiduciary standards are the "prudent investor/professional" standard (Utah Code § 75-7-901) and the duty

of loyalty to act "solely in the interests of the beneficiaries," without tolerance for self-dealing (Utah Code § 75-7-802).

Again, in our case, Utah state law subjects our board to state legislative oversight. In addition to legislative audit on demand and legislative power to amend the code that establishes and governs both the Utah Retirement Systems and its board, the board must report annually to the governor, the legislature, and each participating employer (Utah Code § 49-11-203(1)).

We are further concerned because of the fact that appointed public plan board members are often volunteers or only receive nominal compensation. Excessive restriction, cost and liability will decrease the already shrunken pool of professionals who willingly serve and support an essential function of public industry.

In light of these facts and arguments, we strongly suggest to the Commission that if it is willing to consider public policy in exempting elected and ex officio board members, that it also consider these strong reasons for exempting appointed board members on that same basis.

III. The Commission has expanded Congressional intent for the definitions of certain municipal financial products, including both "investment strategies" and "municipal derivatives."

"Investment Strategies"

15 USC §78o-4(e)(3) only states that "the term 'investment strategies' includes plans or programs *for the investment of the proceeds of municipal securities* that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments." [Emphasis added]. The drafters of the Dodd-Frank Act did not suggest any other inclusions. We respectfully suggest that it is not within the Commission's role to expand the definition beyond such plans or programs *funded by* the proceeds of issuances of municipal securities. Accordingly, we urge the Commission to reconsider its broad interpretation of "investment strategies" that would extend to all "plans, programs or pools of assets that invest funds *held by* or on behalf of a municipal entity." [Emphasis added]. Our suggested literal reading of the relevant legislation would, then, not necessarily include all "public pension funds...participant-directed investment programs or plans such as 529, 403(b), and 457 plans," as the Commission has specifically suggested.

"Municipal Derivatives"

We have also been unable to identify a statutory or legislative history basis for the Commission's proposed expansion of the industry's common usage of the term, "municipal derivatives," which the Commission proposes to include "*any* swap or security-based swap to which a municipal entity is a counterparty." [Emphasis added]. This would mean that any public plan (if not exempted from the term "municipal entity") using interest rate swaps or any other swap in the management of their overall portfolio would be dealing in municipal financial products merely by virtue of being a counterparty to the swap. The industry's traditional and common usage of the term is limited to derivatives *of a municipal security*, such as an interest rate swap on a municipal entity's *own* issued security (e.g. to hedge coupon payments). We argue that if Congress intended to mean something more than the industry's common use of this term, it would have included a specific definition within 15 USC §78o-4(e)(5). We respectfully urge the Commission not to expand the common use definition of this term without legislative basis.

IV. The Commission has broadened Congressional intent with its proposed use of the term, "provides advice," which should not cover the advice most public plan boards provide.

The amended Exchange Act's only insight into what type of "advice" should be covered is "advice with respect to the *structure, timing, terms*, and other matters concerning such *financial products or issues*." [Emphasis added]. The advice board members provide, then, should only be relevant if the plan is determined to be engaging in municipal financial products (as that term is ultimately defined), or if it actually issues municipal securities, *and* the board offers specific advice on those issues.

We would point out that the Commission's proposed definition of "provides advice" also deviates from the language of Congress. We disagree with the Commission's interpretation of the statutory term, "advice with respect to" as meaning "any information relating to," as the Commission has proposed. Additionally, if "financial products and issues" is already clearly defined, there should be no need to expand the scope of covered advice to include other advice unspecified by Congress, as the Commission has broadened to "advice which is primarily financial in nature," including, but not limited to advice regarding interest rate assumptions, financial advantages of particular structures, the financial feasibility of projects and the provision of *any information* relating to municipal financial products or issuances of securities.

We urge the Commission to consider that Congress drafted this provision exactly as they intended it; "provides advice" should only relate to "structure, timing, terms, and other matters" *regarding municipal financial products or issues*.

Conclusion

We appreciate the difficult task that the Commission is charged with in implementing the many changes ordered by the Dodd-Frank Act and are grateful for the opportunity to express our concerns and perspectives prior to the implementation of any final rule. As there may be many unintended consequences, burdens and inefficiencies of new and untested regulation, we thank the Commission in advance for seriously considering our concerns before making any final determination. Although the comment period is coming to a close shortly, we welcome any further communication from your staff to ours and would be happy to provide further clarification of our views at your request.

Sincerely,

Robert V. Newman
Executive Director
Utah Retirement Systems