



The Educational Employees' Supplementary Retirement System of *Fairfax County*
8001 Forbes Place, Suite 300 ~ Springfield, Virginia 22151-2205
703-426-3900 ~ 1-800-426-4208 ~ www.fcps.edu/ERFC

February 22, 2011

Elizabeth M. 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

The Educational Employees' Supplementary Retirement System of Fairfax County ("ERFC"), a pension fund providing benefits to public employees, respectfully submits its comments to the Securities and Exchange Commission's proposed regulations relating to the registration of "municipal advisors" as described and explained in Release No. 34-63576. As we explain below, ERFC believes additional clarification by the Commission as to the definition of "municipal advisor" is needed to allay concerns expressed by many in the public pension community that, except where specific exceptions apply, the registration requirement would extend to all individuals who serve on the governing board of an employee pension fund, even if such individuals only receive and act upon advice from professional investment consultants as to investment decisions. ERFC does not believe it is the intent of either Congress or of the Commission to require such pension fund board members to register as "municipal advisors," but we suggest some clarification from the Commission on this point is needed in this area.

Background

We start with some background of ERFC and how our board is structured such that the Commission will fully understand how a misinterpretation of the Commission's proposed regulations would create unintended problems for public pension funds.

ERFC is a public sector defined benefit plan established in 1973 by the Fairfax County Public Schools ("FCPS") to provide its educational employees (primarily teachers and school-based administrators) an independent retirement plan to supplement their primary benefits from the Virginia Retirement System and the Social Security Administration. The members who earn benefits from ERFC are employees of FCPS, a sub-unit of Fairfax County, Virginia, which is in turn a local government of the Commonwealth of Virginia.

ERFC is entirely funded by contributions that are deducted from the pay of covered employees, additional contributions paid by FCPS, and investment earnings on contributions held in trust. Under section 401(a)(2) of the Internal Revenue Code,

ERFC assets may not be used for any purpose other than the exclusive benefit of covered members and their beneficiaries.

ERFC is governed by a seven-member Board of Trustees. Three of our trustees are appointed by the Fairfax County School Board. In recent years, the School Board has consistently filled these trustee positions with high-level administrators who are full-time employees of FCPS. Another three trustees are elected by and from our active membership. Our current member-elected trustees are all public school teachers who are also employees of FCPS. These six Trustees then refer and recommend a seventh candidate for approval by the School Board as the final Board member. This "individual trustee" must be someone who is not affiliated with Fairfax County, the Fairfax County Public Schools, or any union or similar organization that represents employees of FCPS. This individual trustee position has consistently been an unpaid position. The individual trustee donates his or her time and efforts (for monthly trustee meetings) as a public service.

Even below the level of the Board of Trustees, ERFC has no employees of its own. Employees of FCPS perform all of the necessary administrative services and internal investment functions for the Plan. In addition to those employees, the Board of Trustees appoints outside professionals for specialized advice on investments. In particular, the Board engages the services of nationally recognized registered investment advisers to serve as investment consultants on asset allocation and the selection and retention of professional investment managers. Those investment managers (who are also registered investment advisers) manage portions of ERFC's broadly diversified investment portfolio, and make individual investments in securities under investment guidelines that the Board of Trustees approves.

In all these matters, the Board receives and acts upon investment advice from its investment consultants. No one could view the function of the Board as "providing" investment advice to Fairfax County or FCPS. Rather, we retain qualified professionals to provide such advice to us, and then we act on the advice they provide.

The Board of Trustees has absolutely no role relating to the issuance of municipal securities by Fairfax County or FCPS. The Board of Trustees has not even invested in such securities. The Trustees' sole role is to administer the supplementary pension plan for ERFC members and to invest the assets that have been contributed to fund the members' pensions.

Board Members of Public Pension Funds Should Not Be Considered "Municipal Advisors"

While we cannot speak for all public pension funds, we understand that the basic governing structure of ERFC is very common among public pension funds. Because the Commission's proposed definition of "municipal advisory activities" in § 240.15Ba1-1(e) and the definition of "municipal advisor" in Section 15B(e)(4) of the Exchange Act refer to individuals who provide advice to or on behalf of a municipal entity, we do not

believe that board members of public pension plans who receive and act on advice from investment consultants are intended to be covered by the registration requirement for "municipal advisors." However, the Commission's discussion of governing board members at p.41 of Release No. 34-63576 has raised concerns in the public pension community that board members of a public pension fund such as the teachers, administrators and individual trustee who serve on the ERFC Board would still be required to register as "municipal advisors" even if they only receive and act on advice obtained from retained investment consultants, unless they are covered by a specific exception.

We therefore suggest that the Commission provide some additional clarification that individuals who serve on the governing board of public pension funds would not be covered by the registration requirement to the extent they only receive and act on advice received from investment consultants. We believe that this clarification would resolve most of the concerns that the public pension community has raised about the interpretation of the regulations.

Clarification of Term "Employee of a Municipal Entity"

Another point of confusion and concern in the public pension community is the status of internal investment staff who are employees of a municipal entity that sponsors a pension plan.

Public pension plans appear to fall within the definition of "municipal entity" in Section 15B(e)(8) of the Exchange Act. The definition of "municipal advisor" in Section 15B(e)(4) of the Exchange Act excludes any "employee of a municipal entity." Most board members of public pension plans are employees of a municipal entity – *i.e.*, a municipality that sponsors the pension plan – but are generally not employees of the public pension plan itself. As in the case of ERFC, where a single employer sponsors the plan, the plan itself may have no employees and board members and internal investment staff will be employees of the sponsoring employer. In other cases, such as a plan covering employees of school districts statewide, board members may be employees of individual school districts sponsoring the plan. Concerns have been expressed within the public pension community that board members and internal investment staff who are not employees of the public pension plan itself will not qualify for this exclusion.

We suggest the Commission provide additional clarification that the exemption for "an employee of a municipal entity" would cover board members and internal investment staff who are employees of a sponsoring municipal entity even though not employed by the pension fund specifically.

Exemption for Appointed Board Members of Public Pension Funds

The Commission has proposed drawing a distinction between elected members and appointed members of a governing body of a municipal entity such that elected members would be excluded from the registration requirement while appointed

members would not. The Commission has stated that the reason for this distinction is that "employees and elected members are accountable to the municipal entity for their actions." Release No. 34-63576, p.40-41. We believe appointed members of public pension fund boards should also be excluded because they are similarly accountable to the fund for their actions.

Typically, both elected and appointed board members of public pension funds have the same fiduciary obligations under state law to carry out their duties in the best interest of the fund and its members. For example, all members of ERFC's Board, whether appointed or elected, are subject to all of the following:

- Section 26-45.7 of the Virginia Code, which requires trustees to "invest and manage the trust assets solely in the interest of the beneficiaries."
- Section 51.1-803 of the Virginia Code, which requires trustees to invest the assets of a municipal pension plan "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with the same aims. Such investments shall be diversified so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so."
- Sections 2.2-3100 through 2.2-3131 of the Virginia Code, the State and Local Government Conflict of Interests Act, which prevents any board member from acting in his or her self-interest or in the interest of third parties.
- Sections 2.2-3700 through 2.2-3714 of the Virginia Code (a "government in the sunshine" law), which gives citizens broad rights to attend trustees' meetings and obtain copies of written records.
- Section 401(a)(2) of the Internal Revenue Code, cited above, which precludes the use of plan assets for any purpose other than the exclusive benefit of members and their beneficiaries.

Under the Fairfax County Ordinance that established ERFC, the trustees who are appointed by the School Board serve at the pleasure of the Board and are subject to removal at any time. The member-elected trustees must stand for reelection every three years. And the individual member is subject to removal at any time at the discretion of the other six trustees. Fairfax County Code § 3-4-3. All are thus fully accountable for their performance.

In ERFC, as in all other boards with which we are familiar, the board acts by majority vote, without any distinction among board members' votes based on whether they were elected or appointed. The legal restraints that govern their actions apply equally without regard to whether they were elected or appointed. In light of the fact that appointed and elected board members of public pension funds serve identical roles with identical responsibilities, we believe imposing the cost and burden of SEC registration on appointed members could have unintended negative effects such as creating two separate classes of trustees in an otherwise equal setting and potentially discouraging

Elizabeth Murphy
Securities Exchange Commission
February 22, 2011
Page 5

individuals from volunteering their time to serve on the board of a public pension fund. There have been times in the past when it was difficult to find a member of the Fairfax community who was willing to serve as ERFC's seventh trustee. Although we have been fortunate in recent years to have qualified individuals who were willing to serve the public in this way, a registration requirement imposed as a condition of this public service would make it far more difficult – perhaps impossible – to find volunteers. These negative consequences would not be accompanied by any discernible benefit given the legal and fiduciary obligations already imposed on all public pension fund board members. Therefore, we recommend that the Commission treat all members of the governing board of a public pension fund as covered by the exemption for an "employee of a municipal entity."

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We thank the Commission for its consideration of these comments. We are available to discuss these issues further at your convenience.

Sincerely,



Michael Hairston
Chairperson
ERFC Board of Trustees