INVESTMENT PLANS COMMITTEE
Bay Area Rapid Transit

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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"). 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.

We are writing to urge respectfully that the Commission not adopt its proposal to treat appointed members of the governing body of a 457 deferred compensation plan or a money purchase pension plan as municipal advisors. It is unwise public policy and a questionable exercise of rule-making authority to classify members of public defined contribution plan committees as municipal advisors because:

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

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 employee members of public defined contribution plan committees come within the exclusion.

Background to the BART Deferred Compensation Plan and Money Purchase Pension Plan

I serve as the Chair of the Investment Plans Committee which administers two defined contribution plans, a Money Purchase Pension Plan (the "MPP Plan") and the Deferred Compensation Plan (the"457 Plan") (collectively, the "BART Plans") established by the Bay Area Rapid Transit District ("BART") for its employees. The BART Plans are established under Sections 28870-28913 of the Public Utilities Code, are

both public defined contribution plans, and are offered to bargaining unit and non-represented employees of BART. There are approximately [] participants in the MPP, and [] in the 457 Plan. BART, a special transit district organized under Sections 28500-29757 of the California Public Utilities Code, is an Oakland-based rapid transit system serving the San Francisco Bay Area. 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 both of the BART Plans are held in trust and are administered by the Investment Plans Committee (the "Committee"). District employees are not required or permitted to make pre-tax contributions to the MPP Plan, but may choose to make after-tax contributions of certain leave balances. District employees may choose to contribute to the 457 Plan on a pre-tax basis. BART makes contributions to the MPP Plan on behalf of plan participants. The Committee has entered into a contract with a financial institution to provide Trustee services for the BART Plans, and has also entered into a contract with a recordkeeper to provide recordkeeping services for the BART Plans. In addition, the Committee has entered into contracts with various investment managers to provide investment services to the BART Plans.

Per Section 28910 of the Public Utilities Code, Article IX of the MPP Plan, Article, and Section 13 of the 457 Plan, the Committee is composed of no more than five (5) members. One member is appointed by the General Manager of BART, one member is appointed by SEIU Local 1021, one member is appointed by ATU Local 1555, one member is appointed by AFSCME Local 3993, and one member is appointed by the BART Police Officers Association. Each Committee member is an employee of BART. The Committee meets once a month, and delegates the day-to-day operations of the BART Plans to BART staff or to the Committee's recordkeeper.

During Committee meetings, each of which are subject to California's open meeting law, each member of the Committee expresses his or her opinion, makes comments, discusses proposed actions and votes on matters before the Committee. During their open meetings the members of the Committee routinely and customarily ask questions of their contracted recordkeeper, consultants, and representatives of the mutual fund options, 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, each of the BART defined contribution plans may constitute a "municipal entity" for the purposes of the Dodd-Frank Act, and employee members of the Committee, since they are appointed, may be required to register with the Commission as "municipal advisors."

We respectfully disagree with an interpretation of the definitions of "municipal entity" and "municipal advisor," that would encompass appointed employee members of public defined contribution plan committees 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 Defined Contribution Plans within the definition of Municipal Entity.

In the Release the Commission interprets the definition of "municipal entity" to include public section 457 plans. We respectfully contend that Congress did not intend to include public defined contribution 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 BART defined contribution plans do 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)

Committee members for public defined contribution plans *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 participant-directed programs or plans, such as Internal Revenue Code 457 plans *which do not issue securities*, are the intended *beneficiaries* of the protections afforded by Section 15B of the Securities Act.

2. <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 They Receive, Not Provide, Investment Advice in Fulfilling Their Duties as Fiduciaries</u>.

Members of the Committee are full-time employees of BART. Their job responsibilities are separate and distinct from the tasks they perform in their roles as members of the Committee. Members of the Committee 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 Committee have 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 Committee to retain an

[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.

investment consultant to assist in it in its primary function of selecting and monitoring mutual fund options for selection by plan participants.

The Committee possesses a fiduciary duty to select and monitor the investment fund options offered to plan participants. To this end, the Committee does not make discrete and discretionary decisions in regard to selecting particular and specific investments for individual plan participants. Instead, the Committee makes high-level decisions regarding the selection of investment fund options that are made available to plan participants.

Members of the Committee *rely on, receive, and implement* the advice provided to the Committee by independent and professional consultants. Members of the Committee 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. 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 in the business of municipal securities.

Individuals who sit on the governing boards of public participant-directed investment plans (Code Section 529, 403(b) and 457 plans) are not *professionals, brokers or dealers.* Members of such governing 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 defined contribution plans and the committees 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 public defined contribution plan.

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 defined contribution committees in fact operate. The members of the Committee are subject to an extensive and evolving mosaic of concrete oversight and accountability. The Committee is subject to keen and on-going employee scrutiny; plan sponsor scrutiny; scrutiny by taxpayers; and scrutiny by the local press. Committee 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 Committee'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.

The Committee's Code of Conduct Statement prohibits members from having financial interests that conflict or appear to conflict with their duties to the BART Plans, and from receiving or soliciting gifts or services of monetary value in connection with their duties under the BART Plans.

In addition to the fiduciary and general trust responsibilities imposed by the California Public Utilities Code, Bart Plans, the Investment Objectives and Policy Guidelines, and the BART Code of Conduct Statement, Committee 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 a prudent person standard similar to that under the federal Employee Retirement Income Security Act.
- 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 Committee. 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 Committee 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 Committee are not directly accountable to the participants in the plan and to the BART District simply because they have not been elected. Members appointed to the Committee are subject 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 Committee. 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 Committee will be personally responsible for costs of completing Form MA-1, as well as for the costs complying with the other registration requirements. Further, Public Utilities Code Section 28911, Section 9.03 of the MPP Plan, and Section 13.3 of the 457 Plan, clearly state that members of the Committee cannot receive compensation for their service as Committee 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 Committee.

Unless appointed Committee members 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 Committee.

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.

We 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 and (2) employees of the municipal entity who are appointed by the municipal entity or appointed by the unions representing employees of the municipal entity. For the reasons stated above, we respectfully urge the Commission to clarify that these categories of appointed members of public defined contribution plan committees 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 defined contribution plan committees, 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 defined contribution plan committees in the definition of "municipal advisor" will not advance the Commission's objectives. Appointed members of public defined contribution plan committees 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 defined contribution plan committees.

I welcome any questions you may have regarding my comments.

Sincerely,

Beth Y. Hoitsma for Teresa Murphy

Teresa Murphy, Chair
BART Investment Plan Committee