HTNYS Healthcare Trustees of New York State

Providing New York State's trustees education, advocacy resources, and governance training

#713

February 16, 2011

Elizabeth M. Murphy
Secretary of the Commission
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-45-10

Dear Ms. Murphy:

On behalf of Healthcare Trustees of New York State (HTNYS), I write in response to the Securities and Exchange Commission (SEC) request for comments on the proposed implementation of Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act. HTNYS is an affiliate of the Healthcare Association of New York State and represents the governing boards of more than 550 non-profit hospitals, nursing homes, and home health care agencies. New York State's non-profit health care governing boards are comprised of volunteer community members.

A non-profit governing board's ability to help a health care organization achieve its strategic goals, maintain financial viability, and provide quality care is directly dependent on the skills, knowledge, and commitment of individual board members. Financial expertise is a vital component, providing organizations that provide an essential public service with the means and ability to perform effective oversight and evaluate financial recommendations. Boards cannot afford to lose potential candidates because of overzealous and unnecessary regulatory burdens, such as those imposed by Proposed Rules 15Ba1-1 through 15Ba1-7, particularly in small communities where there are a limited number of candidates with such expertise.

We understand the laudable goal of Section 975 is to promote financial stability by increasing accountability and transparency of transactions involving municipal securities. Section 975 achieves this goal by requiring those who fall within the statutory phase "municipal advisor" to register with SEC and make certain disclosures.[1] Section 975 defines municipal advisor broadly to include anyone who provides advice to a municipal entity or obligated person with respect to municipal financial products, including the structure, timing, terms, and other similar matters concerning such financial products. Finally, the definition of "obligated person" would include non-profit entities that receive funds from municipal securities that are committed to supporting payment of the obligations on those municipal securities.

[1] Information required to be disclosed includes residential history, employment history, business activities, criminal history, regulatory actions, civil judgments, civil litigation, termination of employment, and financial disclosures.

In addition, it appears that municipal financial products would include bond offerings of local industrial development agencies (IDAs) formed under Article 18-A of the New York General Municipal Law. This is of significant importance to our members, as New York health care institutions often rely upon such financing to implement capital projects. Under the proposed rules, it would be unlawful for a board member to provide advice on matters before a non-profit health care entity involving receipt of funds from municipal or local IDA bonds, unless he or she previously registered with SEC as a municipal advisor. We strongly believe the burdens associated with this requirement will dissuade those with much-needed financial expertise from volunteering to serve on non-profit governing boards, and would undermine the full deliberation of matters that are of the utmost importance to health care entities and patients.

Importantly, the proposed rules are unnecessary for non-profit governing boards, because such boards are already subject to legal requirements that fulfill the intent of the Dodd-Frank Act. It is well established that under both statutory and common law that board members owe a duty of care to the organization.

In addition, in the non-profit context there is a well recognized fiduciary duty of obedience to the corporate purpose and mission imposed on board members. In New York, the Attorney General has sweeping powers to supervise the conduct of non-profit organizations, including the power to seek the dismissal of one or more directors to dissolve a corporation that has acted beyond its capacity, or restrain it from carrying on unauthorized activities [New York Not-For-Profit Corporation Law §§ 112(a)(4), 706(d), 720(b)), and 112(a)(1)]. We are confident that other states have similar provisions to oversee the actions of non-profit organizations and their governing boards.

The participation of non-profit board members in discussions related to municipal securities would seem to have only the most tenuous connection to the stated purpose of the Dodd-Frank Act and, we respectfully suggest, existing legal obligations are sufficient to regulate the actions of non-profit board members.

Therefore, we urge SEC to exercise its discretion under 15 U.S.C. § 78o-4(a)(4) to exempt non-profit governing boards from the requirements of the proposed rules. On behalf of HTNYS, we appreciate this opportunity to submit these comments.

Sincerely,

Sue Ellen Wagner

Sue Ellen Wagner
Executive Director

SW:st