

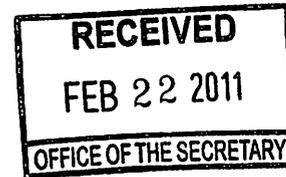
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February 21, 2011



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

RE: File No. S7-45-10; SEC Proposed Rule 34-63576

Dear Ms. Murphy:

I am writing on behalf of the Board of Trustees (“Board”) of the Delaware Public Employees’ Retirement System (“DPERS”), an instrumentality of the State of Delaware (“Delaware”), established on June 11, 1970. The Board is responsible for the administration of DPERS, which is comprised of nine plans and three pension commingled investment funds totaling over \$6.4 billion at the end of fiscal year 2011. DPERS was created to provide retirement, survivor and disability benefits to qualified members and their beneficiaries. *See* 29 *Del. C.* §8308 and § 5542. Today DPERS serves over 54,000 active retirees, members and their beneficiaries.

In response to the second full bulleted item on page 51 of the above Release, I am writing to respectfully urge that the Commission not adopt its proposal to treat appointed members of the governing body of a municipal entity (but not elected officials serving on that body serving as *ex officio* members) as excluded from the definition of municipal entity for the purposes of the definition of municipal advisor in 15 U.S.C. §78o-4(e)(4)(A). The Commission’s proposal includes under the definition of “municipal entity” those “elected members of a governing body of a municipal entity,” yet excludes those “appointed members of a municipal entity’s governing body if they unless *ex officio* members of the governing body.” The distinction the Commission proposes to make is artificial and would be highly disruptive to the fiduciary governance and management of governmental public pension funds. We respectfully urge the SEC to treat all governing bodies of municipal entities and all individuals elected or appointed to serve on their governing boards and committees, as part of the municipal entity for the purposes of 15 U.S.C. §78o-4(e)(4)(A).

This letter will discuss (1) DPERS’ structure and the role of its governing body; (2) the brief paragraph in the Kutak Rock letter which, based upon pages 40-41 of the above Release, appears to have spawned the above proposal for which comments are now being sought; and (3)

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the fundamental problems posed by construing the term “municipal entity” in 15 U.S.C. §780-4 and, in particular, in 15 U.S.C. §780-4(e)(4)(A) in a way which would distinguish between a municipal entity on the one hand and its governing body and/or members of its governing body on the other.

ABOUT DPERS

DPERS is governed by a seven (7) member board which is constituted according to the following statutory scheme:

- The Secretary of Finance and the Director of the Office of Management and Budget serve *ex officio* as voting members of the Board.
- Five other members appointed by the Governor with the consent of a majority of the members elected to the Senate serve as voting members of the Board.
- At least 2 of the appointed members shall be affiliated with 1 of the major political parties, and at least 2 of the appointed members shall be affiliated with the other major political party. Any person who declines to announce such person's political affiliation shall also be eligible for appointment as a member of the Board.

Pursuant to 29 *Del. C.* §8308 the Board has the responsibility and duty to administer DPERS which includes the following pension plans:

- The State Employees' Pension Plan
- The closed State Police Retirement Fund
- The new State Police Retirement Fund
- The State Judiciary Retirement Fund
- The County and Municipal Employees' Retirement Fund
- The County and Municipal Police/Firefighter Retirement Fund
- The Volunteer Fireman's Pension Fund
- The Diamond State Port Corporation Pension Plan
- The County and Municipal Police/Firefighter Other Fund
- The Special Pension Fund

Further, the following funds are the responsibility of the Board for investment purposes only:

- The Local Government Retirement Investment Pool
- County & Municipal Police and Firefighters' COLA Fund
- Post-Retirement Increase Fund
- The State Employees' Other Post-Retirement Benefit Trust Fund (OPEB Fund)

The Board acts as a fiduciary for DPERS. It is charged with a duty of loyalty to act solely in the interest and for the exclusive benefit of the members and beneficiaries of the plans. The assets of DPERS are held and managed in trust by the Board and exclusively dedicated to funding benefits provided for under the plans administered by the Board. The assets of the pension plans are also maintained in accordance with the qualification requirements of Section 401(a), 414(d) and 501(1) of the U.S. Internal Revenue Code, its rules and regulations. Pension fund assets are comprised of aggregated contributions by the “municipal” employers, “municipal” employees’ contributions, and investment portfolio earnings. Pension fund assets are not local, municipal or state monies. Rather these funds may only be used for the payment

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of benefits to participants and beneficiaries in accordance with the terms of the various plans, and for the payment of those operating and administrative expenses of the funds.

The Board of Pension Trustees is assisted in its administration of the DPERS by two sub committees: (i) the Investment Committee comprised of six (6) members and (ii) the Audit Committee, comprised of five (5) members. The Board is authorized to engage outside expert investment consultants, investment managers, and other registered investment advisors as necessary and prudent to advise and assist in the investment and allocation of fund assets, the selection and evaluation of investment managers, the development of investment portfolio strategy, and otherwise make themselves available to advise the board in the prudent discharge of its fiduciary responsibilities. The Board also engages outside expert advisors and consultants to help develop and implement sound actuarial practices and investment strategies for the management, funding and investment of the pension fund. In this regard, the volunteer Board and its Committees are indisputably the “advisee” client of those expert advisors.

Generally, no action of the Board is valid unless it has been approved by a majority vote of the Board at a public meeting with a quorum. In the case of investment transactions, the action must be approved by a majority of the Board eligible to vote during a public meeting. Meetings of the Board and minutes taken at every meeting are subject to the Delaware Open Meetings Law. Further, on behalf of DPERS, the Board issues an annual comprehensive independently audited financial statement to the Governor, the General Assembly, and the public.

The authority and responsibility of the members of the Board are collective and joint. All the serving trustees of the Board have an equal voice and vote in the discharge of their management and fiduciary responsibilities as a board. The Board acts as a collective governing entity. There is no basis for positing that some members of the Board are advisors of other members of the Board, or are any less or more accountable for their actions than any other members of the Board. There is no basis for suggesting that some members of the Board act under some different set of rules than other Board members.

Based on our reading of the presently proposed rules of the Commission, the Board finds it problematic and highly counter-intuitive that individual trustees of the Board under the proposal would, by definition, be individually deemed “municipal advisors” to themselves by virtue of sitting on the Board of DPERS. The Board is not the “advisee” in the investment advisor relationship. All DPERS’ investment advisors are “outside advisors”. None of DPERS’ investment advisors sit on its Board. Board members are not individual “advisors”. They are collectively the “deciders”.

THE KUTAK ROCK LETTER¹

The definition of “municipal advisor” 15 U.S.C. §78o-4(e)(4)(A) added by section 975 of the Dodd-Frank Act excludes from the definition of “municipal advisor” and “municipal entity” an “employee of a municipal entity”. It is the view of the Board that the term “municipal entity” as used in the Dodd-Frank Act would include the governing body of the municipal entity and the members of that governing body (e.g., the DPERS’ Board and its

¹ This is a letter identified in footnote 87 of Release No. 34-63575 and referenced in footnotes 140 and 141 to the discussion on pages 40-41 of the release. We note the letter does not purport to have been written on behalf of any municipal entity or any governing body of any municipal entity.

trustees). Indeed, as discussed below, reading the term “municipal entity” as not including the governing body of the municipal entity and/or its members would effectively eviscerate 15 U.S.C. §78o-4, as amended by section 975 of the Dodd-Frank Act.

The Kutak Rock letter on the first full paragraph on the second page under the heading “Board Members” inquires about the language of 15 U.S.C. §78o-4(e)(4)(A) and asks in particular whether members of the governing body of a municipal entity might be considered “municipal advisors”. Without any legal analysis whatever, the letter assumes the language “... does not automatically exclude a person who serves on the governing body of a municipal entity ...” translates into the assumption that a person serving on the governing body of a municipal entity might be a “municipal advisor”. The letter sought clarification and inquired whether members of a municipal entity who were not “employees of the municipal entity” might be required to register as municipal advisors.

The Kutak Rock letter incorrectly focused on the phrase “employee of a municipal entity” and completely ignored the term “municipal entity” immediately preceding it. The Kutak Rock letter simply asked the wrong question and represents a fundamental misunderstanding of the responsibilities of governmental governing bodies and their members as part of a “municipal entity”.²

THE TERM “MUNICIPAL ENTITY”

The term “municipal entity” appears in 15 U.S.C. §78o-4 as amended by section 975 of the Dodd-Frank Act. It would appear that Congress intended the term to include the governing body of municipal entities and the member of those governing bodies. For example, 15 U.S.C. §78o-4(a)(1)(B) added by section 975 of the Dodd-Frank Act provides:

It shall be unlawful for a municipal advisor to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless the municipal advisor is registered in accordance with this subsection.

Language added by section 975 of the Dodd-Frank Act to 15 U.S.C. §78o-4(c)(1) provides:

[n]o broker, dealer, municipal securities dealer, or municipal advisor shall make use of the mails or any means or instrumentality of interstate commerce to provide advice to or on behalf of a municipal entity or obligated person with respect to

² Presumably due to the pressure of time, Commission staff appears to have accepted the assumption of the Kutak Rock letter that the appropriate question is whether members of the governing body of a municipal entity are to be considered “employees of a municipal entity” for the purposes of the language of 15 U.S.C. §78o-4(e)(4)(A) under discussion. Proceeding to respond to that question, staff sought to draw a distinction between members of a governing body who are appointed to the body on the one hand and members who are elected to the body or who are serving ex officio on the other. Unfortunately, staff does not appear to have had occasion to consider the import of the term “municipal entity” immediately preceding the phrase “employee of a municipal entity” in interpreting the language of 15 U.S.C. §78o-4(e)(4)(A) under discussion.

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municipal financial products, the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, in contravention of any rule of the Board. A municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for who such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board.

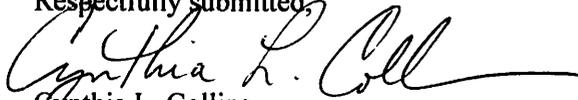
There is no reason to question whether that the term "municipal entity" as used in the above provisions (and as used throughout 15 U.S.C. §78o-4 as amended by section 975 of the Dodd-Frank Act) includes both the governing body of a municipal entity and its members. The term "municipal entity" as used in 15 U.S.C. §78o-4, must include the governing board of the municipal entity and the members of the governing board.

The problem which the Commission's proposal creates is that it requires consideration of individual members of a governing body separate and apart from the governing body for which they serve. The Commission should consider that the board of a "municipal entity" acts as a collective body and generally does not, as members of the body, have authority or power to act separate and apart from the body on which they serve. The body acts collectively. There is no difference between the duties of appointed members, elected members or members serving *ex officio*. The attempt to draw distinctions between and among members of a municipal governing body, when they have exactly the same roles and responsibilities is harmful to the proper governance and fiduciary duties of these boards. Moreover it could have a chilling effect on the recruitment and retention of qualified volunteers to serve as members/trustees of these municipal bodies throughout the country.

CONCLUSION

We respectfully urge that the Commission's rules provide that those boards of trustees and public pension plans authorized, established and governed under state law, be expressly included in the definition of "municipal entity". Further we urge, that the governing bodies of municipal entities and/or all their member trustees, whether elected, appointed, acting *ex officio*, or otherwise, acting within the scope of their duties be included within the definition of "municipal entity" and not deemed "municipal advisors" by virtue of their service on such boards as trustees.

Respectfully submitted,



Cynthia L. Collins

General Counsel

Board of Pension Trustees

Delaware Public Employees' Retirement System

Deputy Attorney General

Delaware Department of Justice