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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

On behalf of the Pennsylvania Public School Employees' Retirement Board ("PSERB") and the Pennsylvania Municipal Retirement Board ("PMRB"), we offer the following comments in connection with Release No. 34-63576 (the "Release"), which proposes the adoption of Rules 240.15Ba1-1 to 240.15Ba1-7 (hereinafter the "Proposed Rules").

PSERB manages the $49+ billion Public School Employees' Retirement System ("PSERS"), the 21st largest public pension fund in the United States with over 560,000 members (including retirees). The PSERB is composed of 15 trustees, who are elected or appointed as set forth below.

PMRB manages the $1.5 billion Pennsylvania Municipal Retirement System ("PMRS"), consisting of 919 separate municipal retirement systems and approximately 14,000 members. PMRB is composed of 11 trustees, nominated and appointed as set forth below.

For the reasons set forth below, both PSERB and PMRB oppose the SEC proposal that any of their trustees to be required to register as a "municipal advisor" as a consequence of serving as a trustee on those retirement boards.

I. Introduction

We believe that the SEC has misapprehended the nature and function of most public retirement boards – certainly PSERB and PMRB – and erroneously assumes that trustees provide investment "advice" in exercising their duties and in participating as members of those boards. Moreover, we respectfully suggest that the SEC has both misconstrued,

and failed to justify the necessity for including any of them as "municipal advisors" under, the Dodd-Frank Act.

The Proposed Rules fail to take into account critical language in the definition of "municipal advisor," who must, among other things, be a person that is *not* a "municipal entity." The SEC focuses on whether a trustee is an "employee" of the retirement board (perhaps because of a letter it received from the Kutak Rock law firm, dated September 28, 2010, commenting on the interim rule), but completely overlooks the "municipal entity" exception to a municipal advisor. If the retirement board, as the SEC suggests, constitutes a "municipal entity," then its governing body, i.e. the board trustees, must be part of that "municipal entity." Otherwise the exclusion of the "municipal entity" from the definition of "municipal advisor" would never be applicable and thus have no meaning.

Or, from another perspective, to whom would a "municipal advisor" give advice? Surely not to a metaphysical disembodied "municipal entity," but rather to the individuals responsible to operate the municipal entity – who, in the case of a retirement board, are the trustees of that board.

Instead, the Proposed Rules focus on whether trustees are "employees" and proposes a distinction based on whether they are elected or appointed. This justification for determining which board trustees must register as municipal advisors is arbitrary and capricious and does not find support in the language of the Dodd-Frank Act. The Proposed Rules overlook the reality that the governing board of a retirement system is, effectively, the "municipal entity."[1] This misapprehension gives rise to legal issues regarding the broad interpretation given to the pertinent definitions of the Dodd-Frank Act in the Proposed Rules. Finally, if applied to the members of PSERB and PMRB, there would be serious difficulties in implementing and enforcing the Proposed Rules in determining who meets the definition of a municipal advisor. Accordingly, for all these reasons, rather than getting hung up on issues such as appointed or elected or *ex officio*, the SEC is respectfully requested to amend its proposed rulemaking to exclude all trustees of public retirement boards from the necessity to register as "municipal advisors," merely because of their positions as trustees.

We note that several comments have already been submitted to the SEC on behalf of various other types of "municipal entities." Without making any comment on the arguments they make regarding their need for exclusion from registration as municipal advisors, we emphasize that our comments relate solely to public retirement boards, specifically in this case, PSERB and PMRB.

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[1] The Public School Employees' Retirement Code specifically states that PSERB shall transact business as "The Public School Employees' Retirement System." 24 Pa. Cons. Stat. § 8521(f). And PMRB transacts all business in the name of the Board.

In addition, PSERB and PMRB join in the comments of the National Conference on Public Employee Retirement Systems ("NCPERS") being filed today, as well as the comments previously submitted on behalf of the New York State Teachers' Retirement System and the El Paso Firemen & Policemen's Pension Fund.

II. The SEC misapprehends the nature of public retirement boards and the "advice" its members give.

The pertinent portion of the definition of a "municipal advisor" is a person *that is not a "municipal entity"* "that provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues . . . ."[2]

To determine whether a board member "provides" financial "advice" "to or on behalf of a municipal entity" that would subject him or her to registration, it is first important for the SEC to recognize the nature of these retirement boards. Perhaps the most important fact is that the composition of each public retirement board, whether it involves state, school or municipal employees, is different. Trying to sweep all their board members under the rubric of municipal advisors based on a metaphysical test for "accountability" suggests an unduly broad and arbitrary definition of municipal advisors. With respect even to the two Retirement Boards submitting this comment, the composition of each is different and unique.

A. PSERB

PSERB has 15 members.[3] The State Treasurer, an elected official, the Secretary of Education (a state official appointed by the Governor) and the executive secretary of the Pennsylvania School Board Association (a non-state official appointed by the Association) are *ex officio* members. Four legislators serve on the PSERB, each appointed by the head of his/her respective body (the Pennsylvania Senate or House of Representatives), one from each party. Three members are elected by the active professional public school employees who are members of PSERS; one member is elected by the non-certified members of PSERS; and one is elected by the retired members of PSERS. Public school board members also elect one member to the PSERB from among their peers. Finally, the Governor appoints two members to the PSERB who must be confirmed by the Senate. The elected members and the non-legislative appointed

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[2] 15 U.S.C. § 78o-4(e)(4)(emphasis added). It also includes "any person who undertakes a solicitation of a municipal entity," which like most other characteristics of a "municipal advisor" has no relationship whatsoever to a trustee of a public retirement board.

[3] 24 Pa. Cons. Stat. § 8501(a).

members serve three-year terms. The legislative members serve during the duration of their legislative terms. Each *ex officio* and legislative member may appoint a designee to the Board to act in his or her stead.

B. PMRB

PMRB has 11 trustees.[4] Two are *ex officio*, the State Treasurer, an elected official, and the Secretary of the Commonwealth, an official appointed by the Governor. The remaining members are appointed by the Governor from nominated municipal elected officials or employees of different classes of municipalities that have joined PMRS and one retired member of PMRS who is receiving a pension. These individuals are nominated to the Governor by the following organizations:

- County Commissioners Association
- Pennsylvania League of Cities
- Pennsylvania Association of Township Commissioners
- Pennsylvania State Association of Township Supervisors
- Pennsylvania State Association of Boroughs
- Pennsylvania Municipal Authorities Association
- association representing municipal fireman
- association representing municipal police

The appointed members serve four-year terms and do not require confirmation by the Pennsylvania Senate.

C. Functions and Duties of Board Trustees

The Board trustees have responsibilities beyond the investment of funds, as is apparent from the diverse manner in which they are chosen and the constituencies from which they are chosen. They all serve without compensation, although certain PSERB trustees receive a minimal per diem for attending board meetings, and the trustees of both PSERB and PMRB all have their necessary expenses on Board business reimbursed. The Boards on which they serve administer and manage funds to provide retirement, death and disability benefits to the members of the respective Systems, which in the case of PSERS is all public school employees in the Commonwealth of Pennsylvania and in the case of PMRS, all qualified members of the 919 municipalities that have joined PMRS. In addition to being responsible for the prudent investment of the retirement funds, they are responsible for overseeing and managing their respective Retirement Systems and their funds, which includes such duties as interpreting benefit rules, issuing adjudications, hiring appropriate actuarial, accounting and investment consultants, adopting actuarial

[4] 53 Pa. Stat. Ann. § 881.103

assumptions, obtaining certified financial statements, and distributing annual statements to members.[5] PSERS operates through committees, which include: Appeals/Members Services, Audit/Budget, Bylaws/Policy, Corporate Governance, Elections, Finance, Health Care,[6] Personnel and Technology Steering. All decisions by both Boards are made collectively by the trustees by majority vote.

With respect to investments, Retirement Board trustees do not advise or specifically approve each and every one of the hundreds of thousands investments made by their respective Systems. Rather the trustees make high level decisions, based on advice received by their outside consultants or advisors, all of whom are *registered investment advisors*, on their respective System's allocation of assets, investment strategies, retention of professional money managers, and related administrative decisions.[7] Such decisions are made pursuant to written and public policies and guidelines established by the Retirement Boards. In short, pension trustees do not *provide* investment *advice* to the Boards on which they serve. They are, rather, the recipients of advice.[8]

It is apparent from this brief discussion that while Board trustees take collective action on certain investment policies and issues based on recommendations from staff or outside registered consultants, their function is not to provide investment advice to their Boards or Systems "with respect to municipal financial products or the issuance of municipal securities."

III. There is no distinction between the responsibility and fiduciary obligations of an appointed trustee and an elected trustee.

A. The SEC's Proposed Rule

To single out Board trustees who require registration, as the SEC proposes, based on whether they are (1) elected and *ex officio*, (2) appointed and *ex officio*, or (3) appointed

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[5] *See* 24 Pa. Cons. Stat. §§ 8502-8505, 8521; 53 Pa. Stat. Ann. §881.104, 881.106

[6] PSERB manages a Health Options Program for retirees. 24 Pa. Cons. Stat § 8502.2.

[7] PSERS also approves major investments in hedge funds or limited partnership private equity funds, based on staff and outside professional advice by registered investment advisors.

[8] To the extent any Board trustee would independently act as an advisor to a different municipal entity that would be a different issue. If that trustee would meet the definition of a "municipal advisor" as to the other entity, it would be totally independent of his or her position as a trustee of the Board, just as in the case of a registered investment advisor.

specifically has no rational basis and would make such determinations very difficult (as shown below), because all trustees have the same accountability and obligations, as trustees, to act in a fiduciarily appropriate manner with respect to the Retirement System they manage and to be accountable to all the members of that Retirement System.

The SEC expresses 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."[9]

First, who are the "citizens of the municipal entity" in this context? This is indeed a strange term to apply to a public retirement system. In any event, the "citizens" would appear to be the members, including the annuitants, of PSERS and PMRS. As for accountability to members of the Retirement System, appointees, either by the Governor, the General Assembly of Pennsylvania, or the bodies to which their employing municipalities belong, all trustees are as directly accountable to those members of the System as an individual elected either by members of the System or, in some cases, by other constituents of the System. Moreover, in the case of both PSERB and PMRB, many of the trustees are themselves retirement plan participants and thus have a doubly accountable interest in their activities as trustees of the Retirement System that they oversee.

All Retirement Board trustees share the identical responsibility regardless of the manner of their appointment or election to the Retirement Board. As trustees they owe a fiduciary duty to act exclusively in the interest of their members to whom they owe a high duty of loyalty. Creating burdens for certain categories of trustees undermines these objectives.

Moreover, the trustees of these Boards are covered by public records[10] and open meeting laws,[11] a comprehensive state ethics and financial disclosure law[12] and universally applied trust law principles and fiduciary duties under state law. There is no rational reason to super-impose a duplicative registration regime on these retirement board trustees in their individual capacities.

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9 Release at 41.

10 65 Pa. Stat. Annot. § 67.101 *et seq.*

11 65 Pa. Cons. Stat. § 701, *et seq.*

12 65 Pa. Cons. Stat. § 1101 *et seq.*

B. Difficulties in Implementation

Even if the SEC does not agree with our position, the various ways in which trustees of just these two Pennsylvania Retirement Boards are chosen shows that it would be extremely difficult, if not impossible, for a retirement board to determine whether a particular board trustee is required to register as a municipal advisor. For example:

- the legislative members of PSERB are clearly elected officials of the Commonwealth of Pennsylvania serving *ex officio*. But they are appointed by the heads of their respective bodies in the General Assembly. Are they "elected" or "appointed"?

- The Executive Director of the Pennsylvania School Board Association serves *ex officio* on PSERB, but he or she is appointed to his or her office by the members of the association. Is that elected or an appointed position?

- The Secretaries of Education and the Commonwealth serve *ex officio* on their respective Boards, but are appointed to those positions by an elected official – the Governor of the Commonwealth. As officials accountable to the Chief Executive of the Commonwealth, who, in turn, is accountable to all citizens of the Commonwealth, are they considered appointed or elected? And, if the former, are they really any less accountable? Moreover, in light of their principal duties and responsibilities, is there any rational reason the Secretaries of Education and the Commonwealth should have to register as municipal advisors because of their *ex officio* positions on retirement boards?

- Most trustees of PMRB are nominated by organizations that have a strong and obvious interest in PMRS. Are these nominated trustees considered to be "elected" by their constituencies, or are they ultimately considered "appointees" of the Governor?

These are some of the difficult questions of interpretation that would face just these two Pennsylvania retirement boards.

IV. The costs and obligations the Proposed Rules would impose on a municipal advisor do not justify registration of retirement board trustees and would be detrimental to the willingness of qualified board trustees, who are not involved in investment matters, to serve as board trustees.

The Proposed Rules seek to justify the imposition of registration and other regulatory requirements through a cost/benefit analysis, which utterly fails to justify the inclusion of Retirement Board trustees.

As to the registration application requirements, natural persons need to make financial disclosures that appear to be totally unrelated to a retirement board trustee's role.

Included are certifications of training and experience to act as a municipal advisor; to meet standards of training, experience and competence; to meet such other qualifications, including testing, required by the SEC and MSRB; and to comply with all regulatory obligations proscribed by the SEC and MSRB.[13] How can it be fair, just and equitable – and not arbitrary and capricious – to impose certifications and requirements on individuals who neither need nor pretend to have the qualifications of, and are not seeking to become, municipal advisors, and then threaten them with penalties if they do not meet the requirements?

The Release contains a plethora of time and cost estimates for compliance.[14] But a review of these pages reveals that they are geared to those who are familiar with forms for those involving, and who are engaged in, financial or investment activities – not for citizen trustees of retirement boards.

The SEC estimates that to fill out the form for an individual would take approximately 3 hours.[15] But a review of the form indicates that it contains many questions that are irrelevant to board trustees who, aside from their role as a retirement board trustee, are not involved in investment transactions. Although the answer to many of the questions in the application would be "none," it is likely that an individual not familiar with or involved in investment form completion would require even more time than that. In addition, registration must also be made with the MSRB, which entails a fee. In any event, whatever measure of time and expense would apply to those individuals is a totally unnecessary one, unlikely to produce any benefit to the SEC, but to impose unnecessary burdens and costs on trustees.

There is also a books and records maintenance requirement.[16] Although it is unclear if and how this requirement would apply to a retirement board trustee, the SEC estimated 181 hours for a municipal advisory firm to comply, although it does not break it down further to an individual "municipal advisor." [17]

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13 Release at 121-25.

14 Release at 145-81.

15 Release at 164.

16 Release at 139-41;176-79.

17 Release at 178.

Indeed, in reviewing over 150 pages of the Release devoted to the registration, record-keeping of municipal advisors and the economic justification therefor,[18] we have not found even one reference to the justification for forcing a retirement board trustee to jump through any of these hoops. While we may have overlooked something, the lack of significant discussion reveals that no real consideration was given to this issue, and that it may have been an add-on based on the Kutak Rock letter.

In sum, there is no reason for any board trustee to incur these burdens.

V. The Dodd-Frank Act does not require such registration.

To the extent that the Proposed Rules are directed at regulating the activities of municipal advisors who "provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products," the Dodd-Frank Act is directed at *protecting* retirement board trustees with respect to the advice they receive from consultants, *not burdening* board trustees with potentially counterproductive requirements.

"Investment strategies" are defined as "plans or programs *for the investment of the proceeds of municipal securities* . . . ."[19] This suggests that the focus of the Dodd-Frank Act was on municipal entities that issue municipal securities, and did not intend to include retirement boards that do not issue municipal bonds or other securities.

The above brief analysis is submitted to show that there are numerous legal difficulties with the expansive reading of several of the defined terms in the Dodd-Frank Act, which, on their face, have no applicability to a public retirement board. For a more exhaustive analysis of the legal impediments to the application of the Proposed Rule to retirement board trustees, we adopt the thoughtful comments of counsel for the New York State Teachers' Retirement System, dated February 18, 2011, the El Paso Firemen & Policemen's Pension Fund, dated February 18, 2011 and the National Conference of Public Retirement Systems, dated February 22, 2011.

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18 Release at 55-214.

19 15 U.S.C. § 78o-4(e)(3)(emphasis added).

Conclusion.

On page 51 of the Release, the SEC stated that it:

> is proposing to exclude from the definition of "municipal entity"[20] elected members of a governing body of a municipal entity, but to include appointed members of a municipal entity's governing body unless such appointed members are *ex officio* members of the governing body by virtue of holding an elective office. Are these distinctions appropriate? Please explain. Are there other persons associated with a municipal entity who might not be "employees" of a municipal entity that the Commission should exclude from the definition of a "municipal advisor"?

The answers of PSERB and PMRB to those questions are, based on the above analysis, that the distinctions between "appointed" and "elected" trustees and between elected *ex officio* trustees and appointed *ex officio* trustees are not appropriate; that the questions themselves are not rooted in the Dodd-Frank Act; and that *all* trustees of a public retirement board are and ought to be excluded from the definition of a "municipal advisor."

Respectfully submitted,

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[20] We assume this is a typo and that the SEC meant to refer to a "municipal advisor."