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February 22, 2011

Via E-Mail: rule-comments@sec.gov

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

Re: File Number S7-45-10, Registration of Municipal Advisors

Dear Ms. Murphy and Commissioners:

The California Public Employees' Retirement System ("CalPERS") is submitting the comments below to the Securities and Exchange Commission ("SEC" or "Commission") in connection with File Number S7-45-10/Release No. 34-63576 (the "Release").

CalPERS was established by the California state legislature in 1932, and it became operational that same year for state employee retiree benefits. The legislature permitted CalPERS to provide health insurance benefits in 1962, and in 1995, CalPERS began offering long-term care insurance on a not-for-profit basis pursuant to legislative authority. CalPERS currently manages retirement benefits for more than 1.6 million California public employees, retirees, and their families. As of June 30, 2010, CalPERS provided pension benefits to more than 1.1 million active and inactive members and over one-half million retirees, beneficiaries, and survivors. CalPERS membership is divided approximately in thirds among current and retired employees of the state, public schools, and participating public agencies.

CalPERS is a defined benefit retirement plan. It provides benefits based upon a member's years of public service, age, and highest average compensation. In addition, benefits are provided for disability and death, with payments in some cases provided to survivors or beneficiaries of eligible members. Approximately one-half of our members pay into Social Security.

CalPERS is administered by a 13-member Board of Administration. **Six CalPERS board members are elected, three are appointed and the remaining four hold office ex officio. The Board composition is mandated by law.**

Background

On December 20, 2010, the SEC proposed Rules 15Ba1-1 through 15Ba1-7 (the "Proposed Rule"), which establish a registration regime for municipal advisors, create a set of disclosure forms for both municipal advisory entities and certain related individuals and impose certain record-keeping requirements on municipal advisors. The Release notes that the SEC "believes it was Congress's intent to include in the definition of 'municipal advisor' persons that provide advice with respect to plans, programs or pools of assets that invest funds held by, or on behalf of, a municipal entity, such as a 529 college savings plan, LGIP or public pension plans."

The definition of "municipal advisor" in the Dodd-Frank Act expressly excludes "a municipal entity or an employee of a municipal entity." However, in the Release, the SEC chose to apply the employee exclusion only to elected or *ex-officio* members of a governing body and not to appointed members. As the rationale for this decision, the Release states:

"The Commission believes that this interpretation is appropriate because employees and elected members are accountable to the municipal entity for their actions. In addition, the Commission is concerned 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."

Comments

As a "municipal entity" under the Proposed Rule, CalPERS welcomes the regulation of its municipal advisors and the transparency that registration will bring to municipal advisory services. CalPERS believes, however, that the Proposed Rule's intention to regulate CalPERS appointed board members as "municipal advisors" is misdirected and contrary to the Rule's intended purpose, for reasons outlined below.

CalPERS agrees with the comments submitted to the Secretary by the National Conference of Public Employee Retirement Systems dated February 22, 2011, and would like to add the following additional comments specific to CalPERS.

1) Distinction Between Elected and Appointed Board Members. The distinction in the Proposed Rule between elected, *ex-officio* board members and appointed board members is an arbitrary and artificial distinction. The Commission defends this distinction in the Release by stating that elected, *ex-officio* board members are accountable to the municipal entity and its citizens while appointed members are not.

In the case of the CalPERS Board, four members serve in *ex-officio* positions, while three members are appointed in a lengthy and detailed vetting process – two by the Governor; and one jointly by the Speaker of the California Assembly and the California Senate Rules Committee. The remaining six are elected by CalPERS pension plan members. Once appointed, all CalPERS board members are subject to identical fiduciary duties and responsibilities. The California Constitution imposes prudent person fiduciary standards on all board members. These standards apply regardless of whether a board member is elected or appointed. Furthermore, CalPERS governing policies treat all board members equally and accord them equal voting powers and responsibilities. No board member is treated preferentially over another board member. To subject only a subset of CalPERS board members to federal registration requirements is based on a distinction that is not recognized by state law. The Proposed Rule would bestow unnecessary and distinctive treatment to a subset of CalPERS board members, which would undermine the equitable representative processes carefully established by and for this agency. For this reason, CalPERS respectfully suggests that the distinction between elected and appointed board members be removed from the Proposed Rule.

2) Role of CalPERS Board Members. CalPERS recognizes that the analysis in the Proposed Rule is not simply whether a board member falls within the employee exemption or not, but turns on whether a board member provides advice on behalf of a municipal entity with respect to municipal financial products or the issuance of municipal securities. In speaking with industry groups, Commission staff members have suggested that usual and customary board behavior, including discussions and voting, would not constitute “advice” that should trigger a requirement to register.

CalPERS board members are unpaid volunteers, many of whom hold full-time jobs separate and apart from their role with CalPERS. Board members meet monthly and, as is typical with boards of directors generally, are not involved in the day-to-day decisions and management of investments. The CalPERS board makes periodic high level policy decisions regarding investments policies and the selection of investment advisors and money managers to provide ongoing advice to it. Many of the advisors retained by CalPERS are registered with the SEC under the Investment Advisors Act of 1940. As a result, CalPERS board members *receive* advice, rather than *render* advice.

Although it is CalPERS’s position that its board members receive advice from their selected investment advisors, rather than render advice, board members nevertheless make important decisions regarding the selection of those advisors and the overarching policies that govern the advice from those advisors. Thus, it is unclear from the Proposed Rule what would constitute advice in the context of a pension board member. Is the establishment of governing policies and the selection of professionals to assist with the implementation of such policies “advice” that would require registration? What

if policies are adopted only every few years? Would a board member only need to register in a year when policy decisions were made?

The fact-based analysis of whether a board member is rendering “advice” in each situation would be both cumbersome and burdensome to administer. CalPERS board members and staff would be required to analyze each discussion and decision to determine whether it constituted “advice.” Furthermore, if participation in a discussion or decision could trigger a federal registration requirement, board members might be reluctant to participate, which would have a chilling effect on the free flow of opinions encouraged among board members.

3) Existing State Requirements for CalPERS Board Members. CalPERS also respectfully disagrees with the Commission position that appointed board members are not “accountable” to the municipal entity or its citizens. Board members are subject to state and local requirements promoting an open public process and accountability.

As previously noted, CalPERS board members are thoroughly vetted prior to appointment. They also are uniformly subject to state constitutional fiduciary standards. This prudent person fiduciary standard applies to all board members by virtue of their service on a public plan board such as the CalPERS board.

CalPERS board members operate in a transparent, open environment. Board members are subject to state ethics laws, conflicts of interests laws, public records laws and open public meetings laws. The latter ensure that all proceedings of CalPERS take place “in the sunshine.” CalPERS is committed to an open process to assure constituents that contributions are protected and wisely managed. To that end, CalPERS publishes notices and agendas of meetings and meeting minutes and welcomes public comments and public participation.

Furthermore, in carrying out their functions for CalPERS, CalPERS board members are subject to heightened fiduciary standards set forth in the California Constitution and in the state’s Government Code, as well as specific governance rules. The duty of care requires every board member, however selected, to act with “...care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity...” would use in discharging such member’s duties to the system. Each board member shares equally in the board’s responsibilities to act in the system’s best interests, and no distinction is made in this regard between appointed or elected board members. The law conceives of a board as an entity accountable to the same constituency, and each member shares the same fiduciary duty to act in the best interest of the entire system regardless of a particular board member representative’s association with a certain subset of the organization’s members or beneficiaries. Indeed, the members’ duty of loyalty requires that the retirement board’s duty to its

participants and their beneficiaries take precedence over any other duty, and not in their own interests or the interests of another entity or person.

Conclusion

The Proposed Rule would be unevenly applied among CalPERS board members, although board members are universally subject to state law requirements with respect to transparency and accountability. Application of the Proposed Rule to CalPERS board members is unnecessary because its stated objective, to ensure accountability, is already achieved through these state laws governing public boards and specific laws applicable to pension boards. CalPERS believes that the objective of the Dodd-Frank Act is to protect, rather than burden, already financially stressed municipal entities.

We applaud the SEC's efforts to issue timely rule proposals. CalPERS would be pleased to discuss this matter further with SEC staff. Please feel free to contact Anne Simpson, Senior Portfolio Manager, at 1-916-795-9672 if you have any questions or wish to discuss this matter further.

Sincerely,


PETER H. NIXON
General Counsel

cc: Anne Stausboll, Chief Executive Officer – CalPERS
Joseph Dear, Chief Investment Officer – CalPERS