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VIA E-Mail (rule-comments@sec.gov)

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

SUBJECT: Comments on Rules implementing Amendments to the Investment Advisers Act of 1940—File Number S7-36-10

Dear Ms. Murphy:

On behalf of our member companies, the American Council of Life Insurers (ACLI) welcomes this opportunity to comment on the proposed amendments to Rule 206(4)-5 (the "Pay-to-Play Rule"), applicable to certain investment advisers, which the Securities and Exchange Commission ("SEC") issued for comment on November 19, 2010.* The SEC has requested that interested parties submit proposed frequently asked questions ("FAQs") to clarify the applicability of the Pay-to-Play Rule. ACLI supports the SEC's goal of eliminating pay-to-play practices from the selection of investment advisers by government entities.

The Pay-to-Play Rule applies to investment advisers who manage "covered investment pools" in which government entities invest, including mutual funds registered under the Investment Company Act of 1940, as well as unregistered investment companies such as private equity, venture capital and hedge funds. The investment advisers must ascertain if there are government entity investors in any private fund they manage, and whether a registered fund that they manage is offered as an option in a participant-directed plan. Such "covered investment pools…shall be treated as though that investment adviser were providing or seeking to provide investment advisory services directly to the government entity" (Pay-to-Play Rule 206(4)-5(c)).

Among the shareholders of mutual funds are insurance companies that hold mutual fund shares in separate accounts. These separate accounts support a wide range of variable life insurance and annuity products through which the insurance company's customers can gain access to the investment experience of the separate account. [Life insurance companies offer group and individual variable life insurance and annuity contracts in which several investment options, including mutual funds, are available through separate accounts. These group and individual variable insurance contracts may be

* ACLI represents more than 300 member companies operating in the United States. These member companies represent over 90% of the assets and premiums of the U.S. life insurance and annuity industry. They are leading providers of financial and retirement security products covering individual and group markets, including life, long-term care, and disability income insurance; annuities; retirement plans such as IRAs and 401(k), 403(b), and 457 plans; and reinsurance.

sold to employees of a government entity in connection with a plan sponsored or established by a state or political subdivision or any agency, authority or instrumentality thereof, including retirement plans authorized by section 403(b) or 457 of the Internal Revenue Code.]

ACLI believes that such insurance company separate accounts and the variable insurance and annuity products they support were not contemplated to be covered by the Pay-to Play Rule, and that the adviser to any mutual fund whose shares may be held in such separate accounts should not be required to ascertain whether the insurance company's customers are government entities, because such a structure is similar to a fund of fund that invests in underlying mutual funds, with the attendant attenuation between the investor and adviser to the underlying fund.

The adopting release, at page 41048-9, realizes that in a fund of funds arrangement, an underlying fund manager's attenuation from the solicitation activities of another investment manager in direct contact with a government entity would exempt it from the scope of the Pay-to Play Rule, save in the case where the investment manager were trying to do indirectly what it could not do directly: "…advisers to underlying funds in a fund of funds arrangement are not required to look through the investing fund to determine whether a government entity is an investor in the investing fund unless the investment were made in that manner as a means for the adviser to do indirectly what it could not do directly under the rule."

ACLI is submitting this comment letter and the proposed FAQ 1, below, as a means of confirming with the Commission that the Pay-to Play Rule is not intended to require investment advisers to mutual funds that are investments of those insurance company separate accounts to make inquiry of the insurance companies that have created those separate accounts concerning account holders who may be government entities.

Further, retirement service providers may be part of or affiliated with insurance companies and may perform recordkeeping and administrative services for governmental defined contribution or benefit plans that may invest in mutual funds directly, rather than through variable insurance supported by separate accounts that hold mutual funds. Such service providers are not normally registered with the SEC and may have no contractual commitment with the investment adviser to a mutual fund. Similarly, we believe that the SEC should confirm that the Pay-to-Play Rule is not intended to require investment advisers to mutual funds held by governmental plans serviced by such providers to inquire of such providers concerning governmental plan investors in those funds.

Additionally, within the context of group and individual variable life insurance and annuity products described above, ACLI seeks confirmation of the scope of the term 'covered associate' and provides the below proposed FAQs 2-5. ACLI may file a supplemental letter to the Commission for the purpose of proposing additional FAQs, if necessary.

Finally, ACLI is requesting the Commission to extend the compliance date for investment advisors affiliated with insurance companies. As we have noted above, insurance companies offer varied financial services in connection with insurance products and frequently are affiliated with registered investment advisers. The Commission in November 2010 proposed a change to the Pay-to-Play Rule that it adopted in July 2010, with comments due less than two months before certain of its provisions become effective. In addition, recent proposed rules by the CFTC and MSRB may also be implicated depending on the business structure or activities of insurance companies. Practically speaking, due to significant structural differences in the SEC, CFTC, and MSRB pay-to-play rules, regulated entities may be faced with trying to develop reasonable compliance procedures to comply with two or more of the rules, with almost no time to analyze and develop those procedures, and then training affected staff, in regards to a rule with such significant penalties.

As an example, the proposed MSRB rule G-42 has different permissible de minimis amounts, and has a comment due date of February 25, with no effective date yet determined. Even beyond determining the

applicability of a particular rule, a potentially covered entity cannot determine whether to comply with the de minimis limits of the Pay-to-Play Rule, or Rule G-42, until the MSRB rule is finalized as to what business activities may implicate the lower limits in G-42.

It seems inconsistent to require regulated entities to comply with proposed revisions to the Pay-to-Play Rule which includes compliance with the proposed MSRB rule, when the MSRB rule will likely not even be final by the March effective date of Pay-to-Play Rule. Insurance companies will require significant time to further analyze the impact of the final rules, in whatever form, on their affiliated businesses, and whether these relationships give rise to potential covered associates. It is unfair to require that this be done in the less than two months remaining until March 14, 2011, and the ACLI respectfully requests an extension to September 13, 2011, when the other provisions of the rule become effective.

FAQs

FAQ 1: Life insurance companies offer group and individual variable life insurance and annuity contracts through which separate account investment options are available. Life insurance company separate accounts may be registered with the SEC as investment companies (unit investment trusts) under the Investment Company Act of 1940, or may be exempt from registration thereunder. Some separate accounts invest exclusively in shares of underlying registered investment companies, similar to a mutual fund that is a "fund of funds". The investment adviser (and, with respect to sub-advised funds, the sub-adviser(s)) of the underlying mutual fund may be affiliated with the insurance company that created the separate account, or there may be no affiliation between the mutual fund adviser and the insurance company. Is the investment adviser (and, for sub-advised funds, the sub-adviser) to a mutual fund in which a separate account invests required to "look through" the separate account and the related variable insurance product to identify whether a government entity owns an annuity contract through which it gains access to the investment experience of the separate account?

A1: No. The arrangement described above should be treated as a "fund of funds", and the investment adviser (and sub-adviser(s), if applicable) is therefore not required to look through the separate account or related variable insurance product to determine whether a government entity is utilizing the separate account investment option. We note, however, that this would not apply if the investment were structured as a means for the adviser to do indirectly what it could not do directly under the rule.

FAQ 2: Under the proposed revisions to Section 206(4)-5(f)(2) related to the definition of "covered associate," the Commission seeks to clarify that the definition of "covered associate" includes a legal entity, not just a natural person, that is a general partner or managing member of an investment adviser. Do the contribution limits apply to a corporation that is a 100% owner, but not a general partner or managing member, of the investment adviser firm?

A2: No. Shareholder contributions, including contributions by a legal entity that is the exclusive shareholder of an investment adviser firm, are not covered unless the contribution would constitute an indirect contribution by the adviser or a covered associate. A legal entity that is not a general partner or managing member of an investment adviser would not be a covered associate under Section 206(4)-5(f)(2)(i).

(To summarize, contributions made to influence the selection process are typically made not by the firm itself, but by officers and employees of the firm who have a direct economic stake in the business relationship with the government client. While a legal entity that is the sole shareholder of an investment adviser may have an indirect economic stake in the business relationship with a particular government client, the Pay-to Play Rule is intended to prevent contributions from being made to public officials for purposes of influencing the award of an advisory contract. In the instance at hand, unless the contribution is an indirect contribution by the adviser or covered associate of the adviser, then the contribution would not be subject to the contribution limits of the Pay-to Play Rule.)

FAQ 3: Is a political action committee controlled by a legal entity that is a 100% owner, but not a general partner or managing member, of an investment adviser firm also considered a covered associate under the rule?

A3: No. Only political action committees controlled by an investment adviser or a covered associate of an investment adviser are considered covered associates for purposes of the rule. Since a legal entity that is not a general partner or managing member of an investment adviser would not be a covered associate under Section 206(4)-5(f)(2)(i), a political action committee controlled by the legal entity would not be considered a covered associate unless it were otherwise controlled by the investment adviser or a covered associate of the investment adviser.

FAQ 4: Are executive officers of a legal entity that is a covered associate of a registered investment adviser also considered covered associates by virtue of their position with the legal entity?

A4: No. An executive officer of a legal entity that is a covered associate of an investment adviser is not considered a covered associate of the investment adviser unless he or she performs a role or function on behalf of the investment adviser that would otherwise fall within the definition of covered associate under the rule.

FAQ 5: What types of activities are considered "policy-making functions" of an officer or other person under Section 206(4)-5(f)(4)?

A5: Whether a person performs policy-making functions for an investment adviser depends on the nature of his or her authority and responsibilities. While there is no single definition that can encompass all potential activities, policy-making functions generally include, but are not limited to: overseeing the executive management or business operations of the investment adviser; serving on the investment adviser's investment committee or otherwise participating in investment policy decisions; developing or approving the strategic plan or business plan that governs the investment adviser's activities; or possessing decision making authority over the investment adviser's budget. Persons whose responsibilities are limited to management of operational or ministerial functions, human resources, or information technology, and who do not otherwise have decision-making authority with respect to the executive management of the investment adviser, generally would not be viewed as engaging in policy-making functions under the rule.

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ACLI appreciates the opportunity to submit these comments and proposed FAQs. Please feel free to contact me if you have any questions or need additional information.

Sincerely,