SUTHERLAND

Grace Building
1114 Avenue of the Americas, 40th Floor
New York, NY 10036-7703
212.389.5000 Fax 212.389.5099
www.sutherland.com

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HOUSTON
NEW YORK
WASHINGTON DC

February 22, 2011

VIA Electronic Mail

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File Number S7-45-10; Release No. 34-63576
Registration of Municipal Advisors

Dear Ms. Murphy:

This letter is submitted on behalf of our clients, Massachusetts Life Insurance Company, Nationwide Life Insurance Company and The Prudential Insurance Company of America (the "Companies"). The Companies appreciate the opportunity to comment on the request for comments by the U.S. Securities and Exchange Commission (the "Commission") in *Registration of Municipal Advisors* (the "Proposing Release").[1] The Proposing Release requests comment on proposed new rules 15Ba1-1 through 15Ba1-7 (the "Proposed Rules") and related forms (the "Proposed Forms," together with the Proposed Rules, the "Proposals") under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The Proposals would give effect to Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"),[2] which has been incorporated into Section 15B of the Exchange Act and provides for a registration and regulatory regime for persons who are "municipal advisors."

The Companies support the goals of the Proposals to regulate the activities of financial advisors to municipal entities and obligated persons. However, as discussed below, the Companies believe the Commission has gone beyond the intent of Congress in a number of important respects. The Companies have serious concerns about the scope of the Proposed Rules and the resulting impact on insurance companies issuing securities, on broker-dealers distributing securities to municipal entities, and on investment advisers providing investment advice to government retirement pension plans.

[1] The Proposing Release was published in Securities Exchange Act Release No. 63756, Registration of Municipal Advisors (December 20, 2010), *available at* http://www.sec.gov/rules/proposed/2010/34-63576fr.pdf.
[2] The Dodd-Frank Act is codified at Pub. L. No. 111-203, 124 Stat. 1376 (2010).

BACKGROUND

The Companies are insurance companies that issue various types of securities, including individual and group annuity contracts, life insurance policies, and stable value contracts. Certain affiliates of the Companies issue or sponsor other types of securities, such as private funds that are excluded from the definition of "investment company" under the Investment Company Act of 1940, as amended, by virtue of Section 3(c)(1) or 3(c)(7) thereof. Some of the securities the Companies issue serve as funding vehicles for retirement plans established by governmental entities ("governmental employers") for their employees. These retirement plans include plans under Section 457 ("457 plans") of the Internal Revenue Code (the "Code") and plans under Section 403(b) ("403(b) plans") of the Code, and can provide for contributions from both governmental employers and employees, or employees only. Employee contributions are generally implemented through salary reduction arrangements. Insurance contracts for 457 plans generally qualify for an exemption from registration under the Securities Act of 1933, as amended (the "1933 Act"), in reliance on Section 3(a)(2) thereof. Insurance contracts for 403(b) plans that are securities generally are registered with the Commission under the 1933 Act.

Distribution of Securities Issued by the Companies. The Companies may offer the securities they issue directly to customers (including governmental employers), or may offer them through broker-dealers that are registered with the Commission (unless they qualify for an exemption) under the Exchange Act and are members of the Financial Industry Regulatory Authority ("FINRA").[3] When distributing securities issued by the Companies these intermediaries also must be licensed as insurance agents under applicable state insurance laws. The Exchange Act and rules thereunder, as well as FINRA rules, apply to the activities of the broker-dealers offering and marketing the securities issued by the Companies and their affiliates. Thus, these intermediaries already are subject to an existing registration and regulatory regime for their distribution activities.

Recordkeeping and Other Services. The Companies and/or their affiliates provide a bundled set of recordkeeping and other administrative services to governmental retirement plans, including 457 plans and 403(b) plans. In connection with these services, all of the Companies offer "open architecture" platforms of mutual funds or group annuity contracts. Some of these mutual funds and sub-account investment options are managed by affiliated companies and others are managed by unaffiliated companies. As a service provider, the insurance company or an affiliated broker-dealer will provide performance data and other relevant information about the investment options available on the platforms. The foregoing services are collectively referred to as "retirement services."

[3] The Companies note that Section 15(a) of the Exchange Act exempts from the broker-dealer registration requirement a person whose broker-dealer activities are limited to the offering of securities that are "exempted securities" for purpose of Section 3(a)(12) of the Exchange Act.

In the case of participant-directed plans, the retirement services provided to plans may include providing investor education information to individual plan participants consistent with the type contemplated by Department of Labor regulations[4] and a Commission staff no-action letter issued to the Department of Labor.[5] Retirement services may also include the provision of advice to participants concerning the allocation of their participant account balance among the investment options available under the governmental retirement plan. While there are different means of providing this kind of advice to participants, a common approach is to provide the advice in compliance with Department of Labor Advisory Opinion 2001-09A (commonly known as the SunAmerica Opinion).[6]

The retirement services provided by the Companies also may include "investment education" under ERISA. In 1996, the Department of Labor published detailed guidance[7] regarding the following four categories of information that it determined to be of an educational nature:

- Descriptive information about a plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan;
- General investment and financial information, including basic investment concepts, historic differences in the return of asset classes, effects of inflation, and assessment of investment horizon and risk tolerance;
- Generic asset allocation models (including models relating to specific plan investment options if specified disclosure are provided) that are based on generally accepted investment theory, are not individualized, and are accompanied by specified disclosures; and
- Interactive investment materials that, essentially, incorporate the above.

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[4] 29 C.F.R. § 2509.96-1.
[5] Department of Labor, SEC No-Action Letter (pub. avail. Dec. 5, 1995).
[6] Department of Labor Advisory Opinion 2001-09A (Dec. 14, 2001). In this advisory opinion, the Department of Labor opined favorably on a structure where a retirement platform provider outsourced to an independent financial expert the development, control and ongoing maintenance of an investment methodology that considered both proprietary and non-proprietary investment options. The advisory opinion allows retirement plan service providers to provide advice consistent with the Employee Retirement Income Security Act's ("ERISA") prohibited transaction provisions by retaining an independent third party to serve as the source of the advice if, among other things, the third party's compensation does not vary based on which securities are recommended. This approach has been adopted by many providers.
[7] *See* 29 C.F.R. § 2509-96-1(d)).

THE SCOPE OF PROPOSED RULE 15Ba1-1 IS OVERLY BROAD

The legislative history of the Dodd-Frank Act reveals that Congress did not intend to subject issuers of securities, broker-dealers distributing securities or investment advisers providing investment advice to the municipal advisor regulatory regime. As the Commission is aware, such market participants already are subject to stringent regulation under the federal securities laws that are administered by the Commission. There is nothing in the legislative history to imply that Congress meant to layer an entirely new regulatory regime on these heavily regulated market participants. The Companies urge the Commission to follow Congressional intent and limit the municipal advisor regulatory framework to those actors Congress sought to regulate.

In April of 2009 the Municipal Securities Rulemaking Board ("MSRB") published a study entitled "Unregulated Municipal Market Participants: A Case for Reform" ("MSRB Study")[8] that set in motion a series of Congressional hearings that ultimately led to the Proposals. In the MSRB Study, the MSRB lamented that:

> The law also does not permit the MSRB to regulate either "independent" financial advisors that provide advice to issuers regarding bond offerings or investment brokers that assist issuers with investing bond proceeds. The MSRB believes regulation of these entities is essential to protect investors and market integrity . . . .

The MSRB also wrote that

> Based on the growth of the market, and the evident regulatory gaps, it is necessary for unregulated market participants to be subject to regulatory oversight that is similar to that mandated for dealers.... Neither swap advisors nor investment brokers are currently regulated at the federal level.... Given the complexity of the municipal securities market, the variety of risks, and the reliance by many issuers on the expertise of these professionals, the MSRB is seeking authority to regulate financial advisors and investment brokers in order to protect investors and preserve market integrity.

In addition, the MSRB Study stated that:

> And yet, despite a thin patchwork of state and local laws, the majority of financial advisors is unregulated and operates in the public sphere without any legal standards or

[8] Municipal Securities Rulemaking Board, "Unregulated Municipal Market Participants: A Case for Reform," *available at* http://www.msrb.org/News-and-Events/Press-Releases/Press-Releases/~/media/Files/Special-Publications/MSRBReportonUnregulatedMarketParticipants_April09.ashx.

> regulatory accountability. The MSRB does not have authority to regulate activities of any non-dealer professionals in the municipal finance market. These include independent financial advisors and swap advisors (collectively, "financial advisors"), and brokers of guaranteed investment contracts and other investment products purchased with proceeds from municipal bond offerings ("investment brokers"). The MSRB believes that regulation of these entities is essential....

The comments from the MSRB are telling. The MSRB Study consistently refers to the need to be able to regulate those non-dealer professionals in the municipal finance market that were, at the time, beyond any federal regulation. The MSRB certainly was not asking to regulate broker-dealers already subject to regulation or issuers of securities (which, throughout the legislative process, were identified as needing *protection from* unscrupulous financial advisors). Nor was there any indication throughout the legislative history of Section 975 of the Dodd-Frank Act that investment advisers registered and regulated under the Investment Advisers Act of 1940, as amended (the "Advisers Act") should be subject to additional regulation. The statements in the MSRB Study are important because it is the MSRB Study that ultimately led to the definition of "municipal advisor" in the Dodd-Frank Act and because the MSRB is, in most respects, the primary regulator of municipal advisors.

Other pieces of the legislative history of the Dodd-Frank Act confirm that the definition of municipal advisor was only meant to capture "unregulated market participants." Specifically, the Senate Report for the Dodd-Frank Act states:

> Section 975 strengthens oversight of municipal securities and broadens current municipal securities market protections to cover previously unregulated market participants and previously unregulated financial transactions with states, counties, cities and other municipal entities.[9]

The Senate Report also quotes testimony provided by Ronald A. Stack, Chair of the MSRB, who said, "Investors in the municipal securities market would be best served by subjecting unregulated market professionals to a comprehensive body of rules...."[10]

In other words, a person whose advisory or solicitation activities, vis-à-vis a municipal entity, are already subject to existing regulation under the federal securities laws was not intended to be subject to the new municipal advisor registration regime.[11] There is no evidence

[9] S. Rep. No. 111-176, at 147 (2010).
[10] S. Rep. No. 111-176, at 148 (2010).
[11] The Companies also note that the legislative history of the House and Senate bills preceding the adoption of the Dodd-Frank Act reflect a primary focus on the need for municipal financial advisor oversight due to the problems experienced in the municipal bond market – and not due to issues unrelated to the municipal securities market. H.R.

that Congress intended firms already subject to regulation for their activities vis-à-vis municipal entities to be subject to the municipal advisor regime as a result of the very same activities.[12] In fact, the Proposing Release begins with the observation that, prior to the adoption of the Dodd-Frank Act, the activities of persons deemed to be "municipal advisors" were largely unregulated[13] and municipal advisors were generally not required to be registered with the Commission or any federal, state or self-regulatory entity with respect to their municipal advisory activities.

USE OF THE TERM "SOLICITATION" IN THE PROPOSED RULES

Proposal. Section 15B(e)(4) of the Exchange Act, as added by the Dodd-Frank Act, defines the term "municipal advisor" as including a person that undertakes a solicitation of a municipal entity or obligated person.[14] Section 15B(e)(9), in turn, defines the phrase "solicitation of a municipal entity or obligated person" to mean:

> a direct or indirect communication with a municipal entity or obligated person made by a person, for direct of indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining and engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity.[15]

The Dodd-Frank Act does not provide a definition of "solicitation," nor is there an existing definition of the term "solicitation" in the Exchange Act. However, the term "solicitation" is used in a rule adopted under the Advisers Act, aptly named "Cash Payments for Client

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Rep. 111-687 to accompany H.R. 3817, Investor Protection Act of 2009 at 54. This report cites Commission Office of Municipal Securities Chief Martha Mahan Haines's hearing testimony in May 2009 before the House Financial Services Committee, which focused on the need for legislation due to the impact on the municipal bond market of poor advice and misleading disclosure documents prepared by unqualified municipal financial advisers and the participation by financial advisors with conflicts of interest or engaged in pay-to-play activities.

[12] Even the Commission's statement in the Proposing Release that "financial advisors, including, but not limited to, broker-dealers already registered with the Commission, that provide advice to municipal entities with respect to their issuance of municipal securities and their use of municipal financial products" (emphasis added) supports the notion that broker-dealers are subject to municipal advisor regulation only if they engage in activities that were previously unregulated.

[13] *See* Proposing Release, *supra* note 1, at Introduction.

[14] 15 U.S.C. § 78 o-4(e) (4)(A)(ii).

[15] 15 U.S.C. § 78o-4(e)(9).

Solicitations."[16]

Comment. The Companies believe that, in using the term "solicitation," Congress was concerned about persons acting as solicitors for broker-dealers, investment advisers and municipal advisors seeking to be retained by a municipal entity for municipal advisory services. The Companies believe that Congress did not intend the term to apply to registered broker-dealers participating in the offering of securities that are offered to municipal entities. While the Companies recognize that the term "solicit" may be used in connection with routine offering activities of broker-dealers, in such instances the broker-dealer is seeking to sell a security and is not seeking to "obtain" or "retain" an engagement of an entity to provide municipal advisory services. The Companies note that, under Commission staff guidance, persons soliciting investors to invest in funds are subject to broker-dealer registration requirements.[17] The Companies urge the Commission to acknowledge that the use of the term "solicitation" is limited to soliciting on behalf of broker-dealers, investment advisers and municipal advisors seeking to be retained by a municipal entity for municipal advisory services, and does not extend to routine broker-dealer selling activities (which is already subject to robust regulation). The Companies further urge the Commission to recognize that broker-dealers, in engaging in routine sales (sometimes referred to as solicitation) activities in connection with the distribution of securities for which they are acting in an underwriter or distributor role for purposes of the 1933 Act, are not providing solicitation activity of the type contemplated by Section 975 of the Dodd-Frank Act (including, but not limited to, Section 15B(e)(9) of the Exchange Act).

The Companies also seek confirmation that providing "retirement services" (as defined above) does not constitute soliciting a municipal entity within the meaning of Section 15B(e)(9) under Section 975(e)(4). The Companies strongly believe that a Company providing an "open architecture" platform of mutual funds or group annuity contracts in the retirement market is not engaging in an indirect "solicitation of a municipal entity or obligated person" on behalf of unaffiliated investment advisers to the mutual funds available on the platform (or to the investment advisers to the funds underlying the investment options offered within a group annuity) within the meaning of Section 15B(e)(9). The Companies believe that such an interpretation is beyond the intent, language and scope of Section 15B(e)(9) and cannot accurately be characterized as an "indirect communication" under this provision. The Companies seek the Commission's confirmation of their understanding.

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[16] *See* Advisers Act Rule 206(4)-3.

[17] *See* Mayer Brown, LLP, SEC No Action Letter (pub. avail. July 28, 2008); U.S. Securities and Exchange Commission Division of Market Regulation, Compliance Guide to the Registration and Regulation of Brokers and Dealers, at 2 (June 2, 1999), *available at* http://www.sec.gov/pdf/bdguide.pdf.

THE TERM "MUNICIPAL ADVISOR" SHOULD NOT INCLUDE REGISTERED BROKER-DEALERS SELLING SECURITIES TO MUNICIPAL ENTITIES

Given the foregoing legislative history, the Companies expected the Proposed Rules to focus on the activities of unregulated persons. However, certain language in the Proposing Release appears to apply the municipal advisor registration regime to broker-dealers selling securities to municipal entities. For instance, the Proposing Release states that, "In addition, a broker-dealer acting as a placement agent for a private equity fund that solicits a municipal entity or obligated person to invest in the private equity fund would be a municipal advisor with respect to that activity." This language would seem to suggest that every time a broker-dealer sells a security to a municipal entity where it is not serving as an underwriter for purposes of Section 2(11) of the 1933 Act, it must register as a municipal advisor.

As noted above, the Commission's conclusion is inconsistent with the legislative history of Section 975 of the Dodd-Frank Act since a broker-dealer's sales activity is heavily regulated under the Exchange Act and FINRA rules. Such sales activity was not the type of activity that the municipal advisor regulatory framework was designed to capture. In addition, it is not clear how the Commission's conclusion is supported by Section 15B(e)(4)(A) of the Exchange Act. This section defines the term "municipal advisor" to mean a person (who is not a municipal entity or an employee of a municipal entity) that (i) 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, or (ii) undertakes a solicitation of a municipal entity. Clearly, the recommendation of a security to a municipal entity involves neither advice with respect to the issuance of a security nor the "solicitation of a municipal entity or obligated person." As noted above, the latter phrase is defined in Section 15B(e)(9) to only cover solicitation of a municipal entity on behalf of an unaffiliated broker, dealer, municipal securities dealer, municipal advisor, or investment adviser and not the solicitation or sale of securities.

Nor does the recommendation and/or sale of the vast majority of securities involve advice with respect to "municipal financial products," a phrase that is defined[18] to mean municipal derivatives, guaranteed investment contracts and investment strategies. Since very few securities are derivatives or guaranteed investment contracts, the only possible interpretive question arises with respect to "investment strategies," a phrase that is defined[19] to include plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments. The recommendation of most securities, such as a private equity fund, cannot accurately be characterized as involving a plan or program for the investment of proceeds of

[18] Exchange Act § 15B(e)(5).
[19] Exchange Act § 15B(e)(3).

municipal securities. Thus, the Commission should elaborate on the support for the sentence quoted above in the Proposing Release.

The Companies submit that requiring broker-dealers to register as municipal advisors when they sell securities to municipal entities would be inconsistent with (i) Section 3(f) of the Exchange Act, which requires the Commission to consider, in addition to the protection of investors, whether a rulemaking would promote efficiency, competition and capital formation[20] and (ii) Section 23(a)(2) of the Exchange Act, which prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[21] Imposing the municipal advisor regulatory regime on broker-dealers with municipal entity customers would hinder efficiency, competition and capital formation and would impose significant regulatory burdens on broker-dealers that are not necessary or appropriate to further the purposes of the Exchange Act.

The Companies also note that applying the municipal advisor regulatory scheme to broker-dealers' sales activities merely because some of their customers are municipal entities is inconsistent with the language of Section 15B(e)(4)(A)(i) of the Exchange Act, as amended by the Dodd-Frank Act. This provision limits the type of financial products and services that cause a person to be considered a municipal advisor under the "advice" prong of the municipal advisor definition. A person should only be considered a municipal advisor when it advises a municipal entity or obligated person with respect to these enumerated products and services and not when a municipal entity happens to purchase other products or services.

Moreover, the Companies submit that, for the following reasons, requiring broker-dealers with municipal entity clients to register as municipal advisors (i) would not offer additional protection to investors and would hinder efficiency, competition and capital formation and (ii) would impose significant regulatory burdens on broker-dealers that are not necessary or appropriate in furtherance of the purposes of the Exchange Act:

- Such an approach will lead to either duplication or inconsistent regulation of the same activity under the broker-dealer and municipal advisor regulatory schemes. As noted in the Senate Report, in adopting Section 975 Congress sought to ensure that the activities of previously unregulated municipal advisors "would become subject to regulation by the MSRB to the same extent as would such activities undertaken by brokers, dealers and municipal securities dealers."[22] Further, the Senate Report notes that under Section 975 the MSRB is authorized to adopt rules with respect to municipal advisors "in the same

[20] 15 U.S.C. § 78c(f). The Commission is required to make this finding whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest.
[21] 15 U.S.C. § 78w(a)(2).
[22] S. Rep. No. 111-176, at 148 (2010).

manner as for brokers, dealers and municipal securities dealers."[23] The Commission recently acknowledged the dangers of duplicative and inconsistent regulation with respect to another type of registrant.[24] The Companies fail to see why such dangers merit any less consideration in the present context.

- If broker-dealers face an additional regulatory scheme for recommending or selling securities to municipal entities, but not when they provide the same services to others, they will have a significant incentive to shift their efforts to other types of customers in order to reduce costs, preserve margins and avoid overlapping and possibly inconsistent regulatory requirements. Such an approach is counter to the notion of functional regulation, the objective of which is to treat similar activity similarly.

- The Companies believe that requiring broker-dealers servicing municipal entities to register as municipal advisors could lead firms to reduce the products and services offered to municipal entities or to cease servicing municipal entities entirely. The Companies are concerned that municipal entities could be harmed by the loss (or contraction) of long-standing brokerage relationships and forced to quickly find other service providers in a difficult financial environment. Thus, the Commission's interpretive position in the Proposing Release has the potential to adversely impact those the Commission is seeking to protect.

The Companies thus ask the Commission to confirm that any broker-dealer activity that was subject to regulation under the Exchange Act and FINRA rules prior to the adoption of Section 975 of the Dodd-Frank Act does not trigger municipal advisor registration.

PROPOSED DEFINITION OF INVESTMENT STRATEGIES IS TOO BROAD

Proposal. Section 15B(e)(3) of the Exchange Act, as added by Section 975 of the Dodd-Frank Act, defines the term "investment strategies" as including plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments.[25] Proposed Rule 15Ba1-1 also would further define the term "investment strategies" to include "plans, programs, or pools of assets that invest funds held by or on behalf of a municipal entity." The Proposing Release explains that this term thus would encompass

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[23] *Id.*

[24] Staff of the Division of Investment Management of the United States Securities and Exchange Commission, "Study on Enhancing Investment Adviser Examinations," at 33, 38 (Jan. 19, 2011) (discussing the danger of having inconsistent rules for investment advisers if they become subject to an SRO).

[25] 15 U.S.C. § 78o-4(e)(3).

pension contributions from employees and state and local government employers.[26] The Proposing Release notes that persons giving advice to a pooled investment vehicle in which a municipal entity has invested funds along with other investors that are not municipal entities would not require such person to register as a municipal advisor,[27] potentially implying that a pooled investment vehicle whose investors are limited to one or more municipal entities, such as governmental retirement plans, would be deemed "investment strategies."

To support its conclusion the Commission notes that the definition of "investment strategies" in Section 15B(e)(3) "includes" plans or programs for the investment of the proceeds of municipal securities and that the definition of a "municipal entity" includes "any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof." Based on these definitions, the Commission 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, local government investment pools or public pension plan. As the Commission notes, such plans, programs, and pools of assets are generally funded from sources other than proceeds of municipal securities. The Proposing Release requests comment on whether the Commission should modify or clarify this interpretation in any way.

Comment. The Commission's proposed interpretation is not supported by the plain language of the statute and fundamental principles of statutory interpretation. The Companies have found no indication in the legislative history that Congress intended the definition of "investment strategies" to include anything beyond plans or programs for the investment of the proceeds of municipal securities. In fact, the Senate Report states, "This section establishes municipal advisors as a new category of SEC registrant. Such municipal advisors provide advice to municipal entities on the issuance of municipal securities, the use of municipal derivatives, and investment advice relating to bond proceeds."[28] If Congress desired to have the definition reach plans, programs or pools of assets that invest funds held by, or on behalf of, a municipal entity, it could have said so. But it did not and the Senate Report demonstrates that it did not intend to so define it.

The Companies also note the lack of the phrase "among other things" or "without limitation" in the statutory definition of "investment strategies," which undermines the Commission's attempt to read the phrase so broadly. In addition, under the fundamental statutory construction principle of *Inclusio Unius Est Exclusio Alterius* ("the inclusion of one

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[26] Proposing Release, *supra* note 1, at text accompanying notes 97-98.
[27] Proposing Release, *supra* note 1, at text accompanying note 98.
[28] S. Rep. No. 111-176, at 147-48 (2010).

thing is the exclusion of another"), the enumeration of certain items within the statute implies the exclusion of others not so enumerated. The Companies find it significant that the Commission could cite nothing in the legislative history to support its broad interpretation and are aware of nothing in the legislative history of the Dodd-Frank Act which indicates Congress meant to include within the definition plans, programs or pools of assets that invest funds held by, or on behalf of, a municipal entity.

In fact, another important principle of statutory construction supports the opposite conclusion. The Companies note that the term "investment strategies" appears in the definition of "municipal financial product" (discussed above), which is defined to mean municipal derivatives, guaranteed investment contracts and investment strategies. Given the fact that the term "investment strategies" is grouped along with municipal derivatives and guaranteed investment contracts, the Commission should interpret the scope of the term consistently with the scope of the terms municipal derivatives and guaranteed investment contracts. The Companies note that the term "guaranteed investment contracts" is defined in Section 15B and the term "municipal derivatives" is defined in the Proposing Release in ways that relate to the issuance and offering of municipal securities. Both guaranteed investment contracts and municipal derivatives relate to the issuance of municipal securities and the acceptance or hedging of risk at the time of issuance of municipal securities. This makes sense because the ills that Section 975 of the Dodd-Frank Act was meant to address relate to the advice provided to municipal entities with respect to their offer and issuance of municipal securities; in no sense was Congress concerned with the investment of funds held on behalf of, for instance, 529 college savings plans, local government investment pools or public pension plans. To interpret the definition of "investment strategies" to reach these pools of assets would be to extend the meaning of "investment strategies" beyond the scope of the terms municipal derivatives and guaranteed investment contracts and beyond the ills Congress sought to fix via Section 975 of the Dodd-Frank Act.

Accordingly, the Companies request clarification that the proposed definition of "investment strategies" is limited to the issuance and offer of municipal securities and does not extend to advice provided at some indefinite point of time in the future to plans, programs or pools of assets (such as 529 college savings plans, local government investment pools or public pension plans) that invest funds held by, or on behalf of, a municipal entity.

Finally, the Companies seek confirmation regarding the types of "investment education" discussed on page 3. These types of investment education have long been accepted in the retirement plan market place and sanctioned by the Department of Labor. To the extent that communications about securities and investment products are limited to the above investment education, the Companies submit they should not constitute providing advice with respect to investment strategies that triggers the need for municipal advisor registration under Section

15B(e)(4) of the Exchange Act, as amended by the Dodd-Frank Act.

REGISTERED INVESTMENT ADVISERS

Proposal. Section 15B(e)(4)(C) of the Exchange Act, as added by Section 975 of the Dodd-Frank Act, excludes from the definition of municipal advisor "any investment adviser registered under the Investment Advisers Act of 1940, or persons associated with such investment advisers who are providing investment advice." Proposed Rule 15Ba1-1(d)(2)(ii) would provide that the term municipal advisor would not include "[a]n investment adviser registered under the Investment Advisers Act of 1940 or a person associated with such registered investment adviser, unless the registered investment adviser or person associated with the investment adviser engages in municipal advisory activities other than providing investment advice that would subject such adviser or person associated with such adviser to the Investment Advisers Act of 1940." The Proposing Release attempts to clarify this language by adding:

> [T]he Commission interprets the exclusion from the definition of "municipal advisor" in Exchange Act Section 15B(4)(C) for registered investment advisers and their associated persons who are providing investment advice, to mean that a registered investment adviser or an associated person of a registered investment adviser would not have to register as a "municipal advisor" with respect to the provision of any investment advice subject to the Investment Advisers Act. A registered investment adviser or an associated person of a registered investment adviser must register with the Commission as a municipal advisor if the adviser or associated person engages in any municipal advisory activities that would not be investment advice subject to the Investment Advisers Act.[29]

The Proposing Release explains that the Commission interprets "advice" in this instance to include any activity that constitutes advice subject to the Advisers Act.[30] The Companies seek clarification on a couple of matters. First, the language in proposed Rule 15Ba1-1(d)(2)(ii) could be read to mean that once an investment adviser engages in activity other than providing investment advice (as such term is defined under the Advisers Act) it *completely* loses the exclusion, *even with respect to the provision of investment advice that squarely is within the meaning of the Advisers Act.* While the Companies do not believe this the Commission's intent, we believe the language in Rule 15Ba1-1(d)(2)(ii) is susceptible to such a reading and therefore request the language be clarified. Second, the Companies recommend that proposed Rule 15Ba1-1(d)(2)(ii) not utilize the phase "**subject** such adviser or person associated with such adviser **to** the Investment Advisers Act of 1940." This phrase "subject . . . to" is confusing and could be read to mean that the advice at issue must be of such a nature as to, *by itself*, "subject"

[29] Proposing Release, *supra* note 1, at text accompanying notes 116-17.
[30] Proposing Release, *supra* note 1, at note 116.

the investment adviser to regulation under the Advisers Act (by, for example, relating to an advisory account with assets under management equal to or greater than $100 million or otherwise trigger registration with the Commission). Again, while the Companies do not believe this was the intent of the Commission, they believe clarification is warranted.

In this respect, we note that a person providing advice to a client as to the selection or retention of another investment manager or managers, under certain circumstances, would be deemed to be "advising" others within the meaning of Section 202(a)(11)."[31] The Companies seek clarification that such advice would fall within the exclusion in proposed Rule 15Ba1-1(d)(2)(ii) even though such activity could constitute a "solicitation of a municipal entity or obligated person" under Section 15B(e)(9) of the Exchange Act. As the Commission staff has acknowledged, the provision of advice to a client regarding a third party investment manager is separate and distinct from whether an investment adviser is soliciting on behalf of a third party adviser.[32] Given the Commission's prior interpretation that investment advice can include advice concerning the selection of another manager, the Companies seek clarification that such advice would obviate the need to register as a municipal advisor even if such advice is provided with respect to the solicitation of a municipal entity under Section 15B(e)(9) of the Exchange Act.

PROPOSED EXCLUSION FOR UNDERWRITERS

Proposal. Section 15B(e)(4) of the Exchange Act, as added by Section 975 of the Dodd-Frank Act, in defining the term "municipal advisor," *explicitly excludes* a broker, dealer or municipal securities dealer acting as an underwriter.[33] However, Proposed Rule 15Ba1-1 would narrow the statutory provision by limiting the exclusion to only cover situations where the firms serve as underwriters of municipal securities. This would drastically reduce the scope of the exclusion. The Proposing Release notes the Commission's belief that Congress provided such an exclusion for broker-dealers in connection with the issuance of municipal securities because underwriting activities are already subject to MSRB rules.[34] The Proposing Release requests comment on whether this interpretation is appropriate.

Comment. The Companies believe that the Commission's interpretation, as reflected in Proposed Rule 15Ba1-1, is not appropriate in light of Congress's intent. The Companies believe

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[31] *See, e.g.,* Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Related Services, Investment Advisers Act Release No. 1092, at note 6 (Oct. 8, 1987).

[32] *See* Stein Roe & Farnham, SEC No-Action Letter (pub. avail. Aug. 25, 1988); Dechert Price & Rhoads, SEC No-Action Letter (pub. avail. Dec. 4, 1990).

[33] 15 U.S.C. § 780-4(e)(4)(C) (providing the definition of municipal advisor does not include a broker, dealer, or municipal securities dealer serving as an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933)).

[34] Proposing Release, *supra* note 1, at note 107.

that Congress intended to exclude the activity of brokers, dealers and municipal securities dealers when acting in an underwriting capacity, that is, participating in an offering of securities, regardless of the type of securities involved in the offering. Indeed, it seems illogical to conclude that Congress did not intend broker-dealers to be subject to the municipal advisor regulatory regime when acting as an underwriter for municipal securities but to be subject to that regime when acting as an underwriter for a different type of security simply because a municipal entity happened to purchase securities in the offering.

The Companies believe that the exclusion should apply any time broker-dealers participate in a primary offering of securities. Such activities already are subject to extensive regulation under the Exchange Act and FINRA rules. The Companies recommend that the Commission revise Proposed Rule 15Ba1-1 to clarify that the exclusion is available any time a broker-dealer participates in a primary offering of securities as an underwriter or distributor and engages in routine selling activities inherent in such participation, including promotional activities and recommendations.

ISSUERS OF SECURITIES

The Companies note that the Proposing Release does not discuss the role of issuers of securities, such as insurance companies that issue group contracts to governmental retirement plans. As issuers of securities that are purchased by municipal pension plans, insurers and some of their affiliates are functionally "counter-parties" to the pension plans vis-à-vis their issued securities. The Companies believe that there is no Congressional intent to apply the municipal advisor regulatory regime to issuers of securities to municipal entities. The Companies request that the Commission confirm that the municipal advisor registration regime does not apply to issuers, such as insurance companies, and their affiliates, of securities issued to municipal entities. The Companies note that such an approach would be consistent with the long-standing position of the Commission that an "issuer" is not a broker-dealer for purposes of the Exchange Act.

CONCLUSION

The Companies appreciate the opportunity to comment on the Proposals and strongly support the Commission's goal of stamping out fraud in the municipal securities marketplace and regulating actors in the market that heretofore have provided advice to municipal entities and obligated persons without being subject to adequate regulation. However, the Companies are concerned that the Commission intends to extend the municipal advisor regulatory scheme beyond that which was intended by Congress and beyond the harms the Dodd-Frank Act was designed to cure. The Companies therefore request that the Commission not extend the municipal advisor regulatory scheme beyond the situations addressed in the legislative history of

the Dodd-Frank Act. While the Commission might be guided by the best of intentions, overextending the municipal advisor regulatory regime will lead to the worst of results. Please contact Michael Koffler (212.389.5014) if you have any questions.

Sincerely,

SUTHERLAND ASBILL & BRENNAN LLP

BY: Michael Koffler
Michael B. Koffler