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September 20, 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 client, the Committee of Annuity Insurers[1] (the "***Committee***"). We are writing to express our appreciation for your willingness to meet with us and certain members of the Committee in-person on May 13, 2011, and via teleconference on June 8, 2011, to discuss various aspects of *Registration of Municipal Advisors* (the "***Proposing Release***"),[2] which requested comment on proposed new rules 15Ba1-1 through 15Ba1-7 (the "***Proposed Rules***") and related forms (the "***Proposed Forms***") under the Securities Exchange Act of 1934, as amended (the "***Exchange Act***"). The Proposed Rules and Proposed Forms would give effect to Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "***Dodd-Frank Act***"), which has been incorporated into Section 15B of the Exchange Act, and provide for a registration and regulatory regime for persons who are "municipal advisors."

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[1] The Committee of Annuity Insurers is a coalition of 32 life insurance companies that issue fixed and variable annuities. The Committee was formed in 1981 to participate in the development of federal securities law regulation and federal tax policy affecting annuities. The member companies of the Committee represent more than 80% of the annuity business in the United States. A list of the Committee's member companies is attached as Appendix A.

[2] The Proposing Release was published in Securities Exchange Act Release No. 34-63756, Registration of Municipal Advisors (Dec. 20, 2010), *available at* http://www.sec.gov/rules/proposed/2010/34-63576fr.pdf.

The Committee appreciates the opportunity to follow-up on the comments we previously submitted in response to the Proposing Release's request for comment (the "***Prior Comment Letter***").[3] The Proposed Rules continue to raise significant concerns for: (i) companies, including insurance companies and investment companies, issuing securities to retirement plans established by municipal entities ("***governmental retirement plans***"); (ii) investment advisers managing mutual funds, hedge funds, private equity funds and other pooled investment vehicles, including insurance company separate accounts supporting variable annuities and life insurance contracts (together "***Insurance Contracts***," and collectively with mutual funds, hedge funds, private equity funds and other pooled investment vehicles, "***Pooled Investment Vehicles***") for, and providing investment advice to, government retirement pension plans; and (iii) broker-dealers marketing the securities, including those issued by Pooled Investment Vehicles, to municipal entities. In light of these concerns, the Committee offers the following additional comments and recommendations that expand upon the Prior Comment Letter.

BACKGROUND

Types of Plans. Committee members include insurance companies and affiliates that issue or sponsor securities for governmental retirement plans, such as mutual funds that are registered under the Investment Company Act of 1940, as amended ("***1940 Act***"), and private funds that are excluded from the definition of "investment company" in the 1940 Act by virtue of Section 3(c)(1) or 3(c)(7) thereof. Some of the securities issued by Committee members and/or their affiliates, particularly mutual funds and Insurance Contracts, serve as funding vehicles for governmental retirement plans established by governmental and municipal entities for their employees. These plans include plans under Section 457 and plans under Section 403(b) of the Internal Revenue Code, and can provide for contributions from both governmental or municipal entities and their employees, or from employees only. Employee contributions are generally implemented through salary reduction arrangements. The governmental and municipal entities typically establish trusts or similar arrangements to hold assets contributed to and invested on behalf of the plans. Further, many governmental and municipal entities establish investment committees to make decisions regarding the funding arrangements for the investment of assets placed in the trust.

Intermediaries. Committee members and their affiliates issuing securities may offer them directly to governmental retirement plans, or may offer them through intermediaries. The intermediaries through which they offer Insurance Contracts must be registered as broker-dealers with the U.S. Securities and Exchange Commission (the "***Commission***") (unless they qualify for an exemption) and be members of the Financial Industry Regulatory Authority, Inc. ("***FINRA***"). The Exchange Act and rules thereunder, as well as FINRA rules, apply to the activities of broker-dealers participating in the offering of the securities. Thus, these intermediaries are

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[3] The Committee submitted a comment letter in response to the Proposing Release's request for comments. *See* Letter from Clifford E. Kirsch, Michael B. Koffler, & Susan S. Krawczyk, on behalf of the Committee of Annuity Insurers, to Elizabeth M. Murphy (Feb. 22, 2011), *available at* http://sec.gov/comments/s7-45-10/s74510-625.pdf.

already subject to an existing registration and regulatory regime for these activities. In addition, these intermediaries also must be licensed as insurance agents under applicable state insurance laws if they are offering Insurance Contracts.

Separate Accounts. Insurance Contracts issued by members of the Committee that are variable Insurance Contracts are supported by insurance company separate accounts. We direct you to the Prior Comment Letter for additional background with respect to how the assets in the separate accounts are managed and invested.

Recordkeeping, Other Administrative Services, and Investor Education. Committee members and/or their affiliates also often provide a bundled set of recordkeeping and other administrative services to governmental retirement plans. As a service, the insurance company or an affiliated broker-dealer often provides performance data and other relevant information about the investment options available on the platforms. In the case of participant-directed plans, the retirement services (*"retirement services"*) provided to plans also 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] In all cases, the entity providing the record keeping and other retirement services act as 'directed record keepers' and act only upon the instructions received by the plan sponsor or another plan fiduciary.

Retirement services *may* also include the provision of advice to participants concerning the allocation of their respective participant account balances among the investment options available under the governmental retirement plan. The Prior Comment Letter discusses providing such advice in compliance with Department of Labor Advisory Opinion 2001-09A (commonly known as the SunAmerica Opinion). The retirement services provided by the Committee members and/or their affiliates also may include "investment education" under ERISA. The Prior Comment Letter discusses the guidance[6] provided by the Department of Labor regarding the types of information that it has determined to be of an educational nature.

ADDITIONAL COMMENTS ON PROPOSED RULES

Proposal. The Commission writes in the Proposing Release that "[i]n 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. The Commission notes that including such activities within the scope of municipal advisory activities is consistent with the Exchange Act."[7] We understand this statement is based

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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] *See* 29 C.F.R. § 2509-96-1(d)).

[7] Proposing Release, *supra* note 2, at text accompanying n. 108.

on the belief that the recommendation of a Pooled Investment Vehicle:

- Falls within the meaning of the definition of municipal advisor set forth in section 15B(e)(4)(A)(i) of the Exchange Act (the "***advice prong***") and

- Is a "solicitation of a municipal entity" as defined in section 15B(e)(9) of the Exchange Act and thus falls within the meaning of the definition of municipal advisor set forth in section 15B(e)(4)(A)(ii) of the Exchange Act (the "***solicitation prong***").

Advice Prong. The advice prong in Section 15B(e)(4)(A)(i) of the Exchange Act defines the term "municipal advisor" as including a person that provides advice to or on behalf of a municipal entity with respect to municipal financial products or the issuance of municipal securities. A broker-dealer's recommendation of a private equity fund, another Pooled Investment Vehicle or any other security (that the municipal entity does not issue or guarantee) to a municipal entity does not involve providing advice with respect to the issuance of municipal securities. In this respect, section 15B(e)(4)(A)(i) provides gloss as to what "advice with respect to the issuance of municipal securities" entails; the statute says it includes advice with respect to the structure, timing, terms, and other similar matters concerning *such* issues. A broker-dealer's recommendation of a *non*-municipal security in the normal course of business does not involve any of these things or any advice whatsoever concerning the issuance of *municipal* securities.

THE TERM "INVESTMENT STRATEGIES" SHOULD BE GIVEN ITS PLAIN MEANING

Investment Strategies. Accordingly, in order to come within the advice prong, the recommendation of a security to a municipal entity must involve "municipal financial products," a term defined[8] to mean municipal derivatives, guaranteed investment contracts and investment strategies. Municipal derivatives and guaranteed investment contracts are relatively clear and narrow in their scope. In the vast majority of cases, the only way a broker-dealer's recommendation of a security like a private equity fund (or other Pooled Investment Vehicle) to a municipal entity will trigger municipal advisor registration is if the broker-dealer provides advice to or on behalf of the municipal entity with respect to "investment strategies," a phrase that is defined[9] 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. A broker-dealer's recommendation of a security falls within the definition of "investment strategies," only if it fairly can be characterized as involving "plans or programs for the investment of proceeds of municipal securities" or otherwise can be said to involve an investment strategy.

Proposed Rule 15Ba1-1 would define the term "investment strategies" to include "plans,

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[8] Exchange Act § 15B(e)(5).

[9] Exchange Act § 15B(e)(3).

programs, or pools of assets that invest funds held by or on behalf of a municipal entity." Underlying this proposed definition is the Commission's assertion in the Proposing Release that the definition of ''investment strategies'' provides that it ''includes'' plans or programs for the investment of the proceeds of municipal securities. As support, the Commission asserts as follows:

> [T]herefore, the Commission interprets the definition to mean that it includes, without limitation, the investment of the proceeds of municipal securities. Further, the Commission interprets this definition to include plans, programs, or pools of assets that invest funds held by or on behalf of a municipal entity, and, therefore, any person that provides advice with respect to such funds must register as a municipal advisor unless it is covered by one of the exclusions. . .

The Commission further asserts that:

> In proposing this interpretation of the term ''investment strategies,'' the Commission considered the statutory definitions of ''municipal advisor'' and ''municipal entity" . . . 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, LGIP or public pension plan. Such plans, programs, and pools of assets are generally funded from sources other than proceeds of municipal securities . . . As a result, the Commission does not believe that it was Congress's intent to limit the requirement to register as a municipal advisor only to those persons that provide advice with respect to plans or programs for the investment of proceeds from municipal securities. Also, because every bank account of a municipal entity is comprised of funds ''held by or on behalf of a municipal entity,'' money managers providing advice to municipal entities with respect to their bank accounts could be municipal advisors.

Implications of the Commission's View. The Commission's view concerning the scope of the definition of "investment strategies" has vast implications. If the definition of municipal advisor were to capture persons who provide advice with respect to plans, programs or pools of assets that invest funds held by, or on behalf of, a municipal entity, regardless of whether such plans, programs or pools of assets are funded from sources other than proceeds of municipal securities, then virtually every single broker-dealer recommending the purchase of securities to a municipal entity customer would, as a practical matter, have to register as a municipal advisor. This would be true even if a broker-dealer merely recommends the purchase of a single security to a municipal entity. As discussed below, we agree with the Municipal Securities Rulemaking

Board ("MSRB")[10] that recommendations made by a broker-dealer, as agent or principal, in effecting the transaction should not subject broker-dealers to municipal advisor registration.

Congressional Intent. The Commission's proposed definition of "investment strategies" seems based solely on the fact that Exchange Act section 15B(e)(3) provides that the term "*includes* plans or programs for the investment of the proceeds of municipal securities." (Emphasis added.) The Committee believes that the Commission's proposed definition is not true to Congressional intent. In fact, the Proposing Release does not cite at all to the legislative history of the statute to support the Commission's assertion regarding Congress's intent of the reach of the definition of "investment strategies."

The Committee does not believe the term was meant to reach funds and pools of assets that are not funded by the proceeds of municipal securities. The Committee has 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, "[t]his 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*."[11]

An important principle of statutory construction supports the conclusion that the term was not meant to reach funds and pools of assets that are not funded by the proceeds of municipal securities. The Committee notes 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. Importantly, 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

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[10] *See* Comment Letter from the MSRB on the Proposing Release, *available at* http://www.sec.gov/comments/s7-45-10/s74510-586.pdf

[11] S. Rep. No. 111-176, at 147-48 (2010) (emphasis added).

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.

The MSRB itself has stated that:

> The MSRB believes that the limited Congressional record on the purposes of Section 975 suggests an intent that "investment strategies" should apply to investment activities, analogous to plans or programs for the investment of the proceeds of municipal securities, that relate to the securities and securities-like vehicles of a municipal entity, rather than to all investment activities of municipal entities, regardless of their nature ... the general fund balances of the municipal entity, which the MSRB believes were not intended to be covered by the definition of "investment strategies" ... Professionals advising on or executing investments of public general and other funds not subject to such specific restrictions or covenants ... would instead be subject to existing applicable investment adviser, broker-dealer or bank regulations governing such transactions.[12]

It is also noteworthy that the MSRB believes that "advice provided by a broker-dealer about a transaction such broker-dealer itself effects that is subject to federal broker-dealer suitability and related business conduct standards" should not be subject to the municipal advisor regulatory regime.[13]

Plain Meaning. The Dictionary of Finance and Investment Terms defines "Investment Strategy" to mean a "plan to allocate assets among such choices as stocks, bonds, cash equivalents, commodities, and real estate. An investment strategy should be formulated based on an investor's outlook on investment rates, inflation, and economic growth, among other factors, and also taking into account the investor's age, tolerance for risk, amount of capital available to invest, and future needs for capital ..."[14] The recommendation of a particular security or a particular rendition of advice may not, in fact, be part of such a "plan" and may not be part of, or entail, an overall "strategy." To dictate, as a matter of law, that each and every securities recommendation and every piece of investment advice necessarily involves an investment strategy is at odds with reality and the plain meaning of the term. Section 15B(e)(3) of the Exchange Act gives some context of the meaning of the term by referencing "plans or programs for the investment of the proceeds of municipal securities." Not every single recommendation of a security or every single piece of investment advice involves a plan or program.

Unintended Consequences. 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. A person should

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[12] Comment Letter from the MSRB on the Proposing Release, *available at* http://www.sec.gov/comments/s7-45-10/s74510.shtml.

[13] *Id.*

[14] *Dictionary of Finance and Investment Terms*, 8th Edition (2010).

only be considered a municipal advisor when it advises a municipal entity or obligated person with respect to the enumerated products and services and not when a municipal entity happens to purchase other products or services.

The Commission's proposed interpretation would require virtually every broker-dealer recommending a single security (regardless of the nature of the security) to its customers to register as a municipal advisor if just one of its customers is a municipal entity. As the Commission is well aware, broker-dealers are heavily regulated under the Exchange Act and by FINRA. As a result, the Commission's proposed interpretation (i) would not offer additional meaningful 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.

The Commission's proposed interpretation of the advice prong will lead to duplication and/or inconsistent regulation of the same activity under the broker-dealer and municipal advisor regulatory schemes. Broker-dealers would be subject to two different regulatory regimes for the same activity and these regimes may, at times, differ in their regulatory approach. This would subject broker-dealers to duplicative and, at times, inconsistent regulatory standards.[15]

THE TERM SOLICITATION SHOULD BE GIVEN ITS PLAIN MEANING

It is our understanding that the Commission's statement in the Proposing Release that "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" is based, in part, on the belief that the recommendation of a Pooled Investment Vehicle involves a "solicitation of a municipal entity or obligated person." As noted, Section 15B(e)(4) of the Exchange Act defines the term "municipal advisor" to include a person that undertakes a "solicitation of a municipal entity or obligated person." 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

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[15] As noted in the Senate Report of the Dodd-Frank Act, 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." S. Rep. No. 111-176, at 148 (2010). Further, the Senate Report notes that under Section 975 the MSRB is authorized to adopt rules with respect to municipal advisors "in the same manner as for brokers, dealers and municipal securities dealers." *Id.* There is no evidence 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. 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 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. *See* Proposing Release, *supra* note 2, at Introduction.

> controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an 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.

It is clear from this definition that the phrase "solicitation of a municipal entity or obligated person," as defined in Section 15B(e)(9) of the Exchange Act, only covers solicitation of a municipal entity on behalf of an unaffiliated broker, dealer, municipal securities dealer, municipal advisor, or investment adviser. It does not cover the "solicitation," recommendation or sale of securities.[16]

The Commission's conclusion that a broker-dealer recommending a private equity fund (or any Pooled Investment Vehicle presumably) ignores long-standing fundamental constructs of the federal securities laws and the plain meaning of the language in Section 15B(e)(9) of the Exchange Act. In using the term "solicitation," Congress was concerned about persons acting as solicitors for brokers, dealers, municipal securities dealers, municipal advisors and investment advisers seeking to be retained by a municipal entity for municipal advisory services. 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 Committee recognizes 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. Nor is a broker-dealer offering a private equity fund (or other Pooled Investment Vehicle) "soliciting" on behalf of the investment adviser managing the assets of a private equity fund (or other Pooled Investment Vehicle). Under Commission staff guidance, persons "soliciting" (*i.e.*, recommending) investors to invest in Pooled Investment Vehicles are subject to broker-dealer registration requirements[17] because they are recommending the purchase of a security. As the Commission itself has acknowledged, the investment adviser to the Pooled Investment Vehicle, on the other hand, has no advisory relationship with such investors:

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[16] The statement in the Proposing Release that "[t]he Commission would consider a solicitation of a single investment of any amount in a municipal entity to require the person soliciting the municipal entity to register as a municipal advisor" has generated considerable confusion on this point. The reference to "solicitation" in the first part of the sentence is describing a recommendation of a security to a municipal entity by a third party (presumably a broker-dealer or investment adviser) while the reference to "soliciting" in the second part of the sentence refers to an entity engaged in a "solicitation of a municipal entity or obligated person"

[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.

> We note that rule 204-3 requires only that brochures be delivered to "clients." We further note that the Court of Appeals for the D.C. Circuit stated that the "client" of an investment adviser managing a hedge fund is the fund itself, not an investor in the fund. *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006).[18]

The Commission staff similarly has stated that:

> Rule 204-3 requires only that brochures be delivered to "clients." A federal court has stated that a "client" of an investment adviser managing a hedge fund is the hedge fund itself, not an investor in the hedge fund. (*Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006)). An adviser could meet its delivery obligation to a hedge fund client by delivering its brochure to a legal representative of the fund, such as the fund's general partner, manager or person serving in a similar capacity.[19]

To conclude that a broker-dealer recommending a Pooled Investment Vehicle to an investor (*e.g.*, a municipal entity) is "soliciting" on behalf of the investment adviser to the pool, within the meaning of Section 15B(e)(9) of the Exchange Act, when the adviser never has a legal relationship with investors in the pool, defies logic, is inconsistent with longstanding Commission positions under the federal securities laws and assumes a relationship (an investment advisory relationship between the investment adviser and pool investors) that, *as a matter of law*, does not exist.

To argue that the foregoing points are not relevant because Section 15B(e)(9) of the Exchange Act is a new statutory provision added under the Dodd-Frank Act and therefore the rules (*e.g.*, rule 206(4)-3) under the Investment Advisers Act of 1940, as amended ("***Advisers Act***") and interpretations thereunder are not relevant misses the point. If, *as a matter of law,* investors in a Pooled Investment Vehicle do not have an advisory relationship with the pool's investment adviser,[20] then it is impossible for a broker-dealer recommending a security to a municipal entity to also be deemed to be soliciting for or on behalf of the adviser to the pool. To conclude otherwise would, in effect, be a refutation of the decision of the Court of Appeals for the D.C. Circuit in the *Goldstein* case as well as the Commission's (and staff's) prior statements on this subject. Logic does not support the notion that a broker-dealer recommending a Pooled Investment Vehicle can be deemed to be soliciting on behalf of the pool's investment adviser under Section 15B(e)(9) of the Exchange Act, when there is no legal relationship between the adviser and the investors in the pool (*e.g.*, a municipal entity).

After all, section 15B(e)(9) of the Exchange Act's definition of the term "solicitation"

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[18] Advisers Act Release No. IA-3060, at n. 192 (July 28, 2010).

[19] Staff Responses to Questions About Part 2 of Form ADV, Q&A III.2, *available at* http://www.sec.gov/divisions/investment/form-adv-part-2-faq.htm.

[20] We assume, for this purpose, that there is no additional, separate relationship between an investor in the pool and the pool's adviser (other than in the context of the pool itself).

contemplates, among other things, the possibility of a client relationship between a municipal entity and an investment adviser. Accordingly, the Committee believes that the language contained in section 15B(e)(9) of the Exchange Act evinces a clear Congressional intent that the phrase "solicitation of a municipal entity," contemplates the formation of a client relationship (or at least the possibility of a relationship) between the municipal entity and an investment adviser (or a broker, dealer, municipal securities dealer or municipal advisor); if such a relationship cannot be formed as a matter of law, then the recommendation of the security (or any other activity) by the broker-dealer cannot be a "solicitation" within the meaning of section 15B(e)(9).

The Committee also believes that a record keeper should not have to register as a municipal advisor when it provides a governmental retirement plan a list of available investment options that contains mutual funds, investment options underlying group variable annuity contracts or other securities or otherwise provides retirement services. An entity providing an "open architecture" platform of mutual funds or Insurance 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). As is the case outside of the retirement plan context, such an interpretation is beyond the intent, language and scope of Section 15B(e)(9). The Committee seeks the Commission's confirmation of its understanding.

RECORDKEEPING AND OTHER ADMINISTRATIVE SERVICES SHOULD SUBJECT AN ENTITY TO MUNICIPAL ADVISOR REGISTRATION: DISTINGUISHING BETWEEN INVESTMENT ADVICE AND INVESTOR EDUCATION

Given the broad interpretation of the term "investment strategies" in the Proposing Release, the Committee is concerned that retirement services (as described above)—which typically include recordkeeping and other administrative services, as well as investor education materials—could be deemed investment "advice" with respect to a municipal financial product (*i.e.*, an investment strategy). The Committee strongly believes that that the provision of retirement services by Committee members and/or their affiliates should not trigger municipal advisor registration.

The provision of recordkeeping and other administrative services, as well as investor education materials provided to plans, should not be deemed investment "advice" with respect to a municipal financial product because they are fundamentally different than the types of services the Commission has typically categorized as investment advice. The Committee believes that none of the retirement services described above fall within the definition of investment advice, as this has been interpreted by the Commission and the staff.[21] In this respect, the Committee notes that the Commission staff has taken the general position that information provided to a plan

[21] *See* Investment Advisers Act Release No. 1092 (Oct. 8, 1987); SEC Division of Investment Management: Staff Legal Bulletin No. 11.

which simply describes or explains the various options available under the plan, without any analysis or recommendation with respect to these options, would not constitute "investment advice" as this term is used in the Advisers Act.[22]

Finally, the Committee again notes that the types of "investment education" discussed above have long been accepted in the retirement plan market place and expressly sanctioned by the Department of Labor in the context of administering ERISA, a statute that imposes fiduciary obligations on those who provide investment advice to certain retirement plans. While the Commission may not be focused on the administration and interpretation of ERISA, the Commission should be aware of the seismic shift that would occur in the retirement markets (both in the governmental and non-governmental retirement markets[23]) if plan recordkeepers and administrators are required to register as municipal advisors as a consequence of providing objective information about plan funding options (including providing sample plan lineups).

We submit that if the mere presentation of materials on plan lineup options, which often includes information governmental retirement plans rely on to help meet their fiduciary obligations, is deemed to trigger municipal advisor registration, then this will result in harm to the governmental retirement plans the Commission is seeking to protect. The Committee believes the Commission's proposed interpretations will significantly limit the transmission of fundamental information about plan options to governmental retirement plans. The Committee further believes that small and mid-size plans would be hurt the most because such plans generally lack economically feasible alternative ways of obtaining objective information about plan options.

The Committee notes that plan sponsors, or the employees appointed by the sponsor as trustee or named fiduciary, generally have a fiduciary duty to select and monitor the investment options available under the plan, unless such functions are expressly delegated to a third party. In contrast, the record keepers are 'directed' rather than discretionary service providers and act only upon the instructions received from the plan sponsor or another plan fiduciary. Since 1974, retirement plan record keepers have employed various controls to ensure they are not deemed to be giving advice or otherwise acting as fiduciaries within the meaning of ERISA. As noted in footnote 23 of this letter, most record keepers employ the same practices, processes and procedures in the governmental retirement plan markets as they follow in the corporate

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[22] *See* Letter to Olena Berg, Assistant Secretary, DOL Pension and Welfare Benefits Administration, from Jack W. Murphy, Associate Director, SEC Division of Investment Management (Feb. 22, 1996); *see also* Letter to Olena Berg, Assistant Secretary, DOL Pension and Welfare Benefits Administration, from Jack W. Murphy, Associate Director, SEC Division of Investment Management (Dec. 5, 1995).

[23] As certain Committee members have relayed to the staff, Committee members servicing both the governmental and non-governmental retirement markets employ substantially similar operational processes, policies, procedures and controls even though governmental retirement plans are not subject to ERISA. This industry practice arose because (i) of state statutes that apply in the government retirement market and (ii) most firms are operationally incapable of implementing different operational processes, policies, procedures and controls on a cost-effective basis depending on whether a retirement plan is subject to ERISA.

retirement plan markets, and do not act as fiduciaries for governmental retirement plans under applicable state law. We understand the Commission staff to be of the view that retirement plan record keepers could be deemed to be providing investment advice, and therefore would be municipal advisors, if they provide information to plan sponsors about funding options and answer basic questions about such options. Such a conclusion by the staff would be devastating to record keepers and others that service governmental retirement plans and put such entities in the impossible position of being deemed to be fiduciaries under the municipal advisor regulatory regime but not under state law or ERISA (if such conduct had occurred in the context of a corporate retirement plan subject to ERISA). It seems untenable for record keepers and other entities to operate in a context where a given activity is deemed to be investment advice and trigger fiduciary duties under one regulatory scheme but not under the ERISA regulatory scheme they have been operating under for 37 years, particularly when ERISA is viewed as being the preeminent statutory scheme setting forth fiduciaries' responsibilities in the context of employee benefit plans. The Committee thus cautions the Commission that if the Proposed Rules are adopted substantially as proposed, they will cause significant disruption for retirement plan industry service providers, harming both governmental retirement plans and their participants.

Municipal entities sponsoring governmental retirement plans must take responsibility for either hiring an investment adviser, municipal advisor or broker-dealer to provide advice with respect to funding options or make the decision on its own. Where municipal entities hire an investment adviser or municipal advisor to provide advice as to funding options, that investment adviser or municipal advisor is subject to various fiduciary duties. Where a broker-dealer is hired to execute securities transactions and provides investment advice incidental thereto, then the broker-dealer is subject to regulation under the Exchange Act and FINRA rules.

In cases where a municipal entity decides to make the decisions on its own, then it is responsible for the decisions made. The Commission should not seek to use the municipal advisor regulatory framework to "plug a perceived gap" in cases where there is no independent third party subject to a fiduciary duty providing investment advice to a municipal entity by artificially imposing the municipal advisor regulatory regime on parties (*i.e.* plan recordkeepers and administrators) that have some contact with municipal entities with respect to their retirement plan. Imposing the municipal advisor regulatory regime on recordkeepers and administrators, in part, because there is no other entity "in the picture" is inappropriate and inconsistent with the language and purposes of section 975 of the Dodd-Frank Act. Every municipal entity has the option of hiring an independent fiduciary to provide investment advice. Recordkeepers and administrators should not be punished by a particular municipal entity's decision not to do so.

ISSUERS OF SECURITIES

As noted in the Prior Comment Letter, the Proposing Release does not discuss the role of issuers of securities, such as mutual funds, hedge funds, and other Pooled Investment Vehicles and insurance companies that issue Insurance 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.

Issuers and purchasers of securities thus generally occupy "opposite sides of the table" in arms-length transactions, and often have conflicting economic interests. As counter-parties to those purchasing the securities, it seems untenable for issuers to be subject to a fiduciary duty. Moreover, issuers of securities usually do not provide purchasers of their securities any investment advice regarding the securities being issued. Finally, we submit that there is no Congressional intent to apply the municipal advisor regulatory regime to entities that issue securities to municipal entities. Acknowledging that issuers of securities are not municipal advisors 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 Committee strongly supports 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 Committee remains 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 Committee therefore urges the Commission to reconsider the scope of the Proposed Rules and Proposed Forms in light of the comments offered in this letter, and make appropriate modifications and clarifications.

The Committee appreciates the opportunity to meet with the staff on the Proposing Release and would be happy to meet to elaborate on the comments made herein should the staff think such a meeting would be useful. Please contact Clifford Kirsch (212.389.5099), Michael Koffler (212.389.5014) or Susan Krawczyk (202.383.0197) if you have any questions.

Sincerely,

SUTHERLAND ASBILL & BRENNAN LLP

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FOR THE COMMITTEE OF ANNUITY INSURERS

Appendix A

THE COMMITTEE OF ANNUITY INSURERS

AEGON Group of Companies
Allstate Financial
AVIVA USA Corporation
AXA Equitable Life Insurance Company
Commonwealth Annuity and Life Insurance Company
CNO Financial Group, Inc.
Fidelity Investments Life Insurance Company
Genworth Financial
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
Hartford Life Insurance Company
ING North America Insurance Corporation
Jackson National Life Insurance Company
John Hancock Life Insurance Company (USA)
Life Insurance Company of the Southwest
Lincoln Financial Group
Massachusetts Mutual Life Insurance Company
Metropolitan Life Insurance Company
Nationwide Life Insurance Companies
New York Life Insurance Company
Northwestern Mutual Life Insurance Company
Ohio National Financial Services
Pacific Life Insurance Company
Protective Life Insurance Company
Prudential Insurance Company of America
RiverSource Life Insurance Company
(an Ameriprise Financial company)
SunAmerica Financial Group
Sun Life Financial
Symetra Financial
The Phoenix Life Insurance Company
TIAA-CREF
USAA Life Insurance Company