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September 21, 2009

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

Re: Request for an Extended Comment Period on Proposed Rules under the Investment Advisers Act of 1940 Governing Political Contributions by Investment Advisers to State and Local Entities [File No. S7-18-09]

Dear Ms. Murphy:

On August 7, 2009, the SEC proposed a new rule and rule amendments under the Investment Advisers Act of 1940 that would govern political contributions by investment advisers who manage assets or provide advice for state and local pension, retirement, and 529 plans.[1] The detailed proposal could have an impact on life insurers advising or managing assets in these areas.

The American Council of Life Insurers[2] (ACLI) will provide thoughtful, responsive comment on the initiative, as we did in response to a similar proposal in 1999. Our policy groups are unequivocal that the breadth and depth of the proposal warrant an extension of the comment period by at least 60 additional days and up to 90 days. An extended comment period will generate more valuable and informed commentary.

**Background**

ACLI promptly circulated the initiative to its membership and convened a meeting of a technical working group under its Securities Regulation Committee that are addressing different aspects of the proposal and developing positions for review and approval of the committee. This process ensures broad, consensus-based policy development and provides valuable substantive feedback. It is, however, meticulous and time consuming.

[1] *See Political Contributions by Certain Investment Advisers*, 74 Fed. Reg. 151 at 39840 (Aug. 7, 2009); Release No. IA-2910, File No. S7-18-09. The SEC proposal would "prevent an investment adviser from making political contributions or hidden payments to influence their selection by government officials for investment advisory services." During its open meeting on the issue, the SEC voted unanimously to advance the initiative to curtail "pay to play" practices by investment advisers that seek to manage money for state and local governments.

[2] ACLI is a national trade association with 340 members that account for 93 percent of the industry's total assets, 93 percent of life insurance premiums, and 95 percent of annuity considerations.

Our groups preliminarily determined that the initiative will have a direct impact on life insurers that provide investment advisory services to state and local governmental entities. The important task of identifying and thoroughly analyzing the full implications of the initiative will require concentrated focus and time. We will need to evaluate regulatory, structural and financial implications for life insurers. Moreover, each of these considerations must be analyzed against unique fact patterns, business models, and organizational structures.

Industry groups like our trade association circulate regulatory proposals, elicit membership input, develop a consensus, and circulate draft letter of comment before submission. This worthwhile, but time intensive, process is difficult to execute in a 70 day comment period, particularly given the proposal's significance and complexity.

The special time burdens confronting regulated industries and large organizations in digesting regulatory proposals were explicitly recognized by the Administrative Conference of the United States in its publication entitled *A Guide to Federal Agency Rulemaking*[3] ("*Guide*"), which notes that:

> [i]nterested persons often are large organizations, which may need time to coordinate an organizational response, or to authorize expenditure of funds to do the research needed to produce informed comments.[4]

The *Guide* reviews the legislative history of the Administrative Procedure Act and emphasizes that the notice of proposed rulemaking "must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument." [5] The *Guide* further explains that rules developed through notice and comment procedures must be rational, and that notice and opportunity for comment under §553 of the APA should properly "give interested persons a chance to submit available information to an agency to enhance the agency's knowledge of the subject matter of the rulemaking."[6] The *Guide* also points out that "informal rulemaking procedures should provide interested persons an opportunity to challenge the factual assumptions on which the agency is proceeding and to show in what respect such assumptions are erroneous."[7] Our request for an extended comment period comports with these goals.

In 1999, the SEC invited comment on a similar "pay-to-play" initiative that elicited extensive input. ACLI provided a detailed letter of comment, parts of which are cited in the 2009 proposal[8]. The ten-

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[3] *See, A Guide to Federal Agency Rulemaking* (1983) at 124. The American Bar Association updated and republished this *Guide* in 1998. *See* Lubbers, *A Guide to Federal Agency Rulemaking*, Third Edition (1998), American Bar Association, Government and Public Lawyers Division and Section of Administrative Law and Regulatory Practice. Subsequent citations to the Guide are to the updated and revised ABA publication.

[4] *See* Guide at 196.

[5] Administrative Procedure Act: Legislative History, S. Doc. No.24879-258 (1946) [hereinafter legislative history of the APA].

[6] *See* Guide at 197.

[7] *Id* at 182 and 196.

[8] *See* footnote 98 in the release. While recognizing the SEC's goal to eliminate abuses in the investment advisory business, ACLI stated in response to the 1999 action that the scope of proposed Rule 206(4)-5 greatly exceeded its regulatory objective. The proposal would have reached many executive officers at life insurers having no connection to the day-to-day operation of an investment advisory unit or subsidiary of the insurer. ACLI noted that the proposal would have been better suited to entities primarily engaged in rendering investment advisory services than to large diversified financial institutions engaged in a variety of financial product and services. In solution, ACLI recommended in 1999 that the proposal needed prudent modification to appropriately match its scope to its regulatory purpose. ACLI recommended that Rule 206(4)-5 be sensibly tailored to stem "pay-to-play" practices without unreasonably burdening entities beyond the proposal's regulatory purpose through definitional precision and interpretive clarification. Specifically, the ACLI recommended that:

- Adding a new definition of *governmental investment advisory professional* to the rule would greatly improve its

year interval between the two proposals underscores the initiative's complexity and significance. As the SEC expended the time necessary to formulate its proposal, commentators should likewise have a functionally appropriate period of time to review and respond to the many detailed issues in the release.

**Need for an Extended Comment Period**

Unlike some other commentators, ACLI's submission will reflect the views of 340 life insurance companies representing 93% of the life insurance and annuities business. Our consensus-based position, therefore, will provide substantial, broad input for the SEC on this initiative. By the same token, however, the process of achieving consensus is more time consuming for a large organization representing diverse interests.[9]

The proposal appeared in the Federal Register on August 7, 2009 and provided a 70-day comment period that occurred during the peak of the summer vacation season, including the federal holiday for Labor Day on September 7, 2009. The complex release spans 114 pages, has 265 lengthy substantive footnotes, and elicits responses to over 31 specific, detailed questions. The initiative is profound, and merits thorough analysis and constructive input.

In responsibly formulating comment, our members are digesting the initiative to discern any unintended consequences that should be properly highlighted for the SEC's attention. This high-level conceptual review of all the proposal's features is essential, time consuming, and fundamental to any rulemaking review. Many of the specific requests for comment present valuable queries requiring substantial analytical or conceptual effort.

For example, the release commendably asks whether there is "another approach that would cause less disruption to the government client" than the proposed prohibition on compensation "after triggering the two-year time out."[10] The answer to this worthwhile question is vital, but does not lend to a quick or simplistic response.

In addition to evaluating the initiative's substance, several other significant statutory, procedural and cost considerations merit careful analysis, such as:

- The release's cost-benefit analysis;[11]
- Paperwork Reduction Act considerations;[12]

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application and parallel the SEC's municipal securities template for the rule;

- The proposed definitions of *executive officer* and *solicitor* should have contained a nexus to governmental advisory activity to fulfill the SEC's goal of a narrowly tailored rule;
- The rule would have operated more equitably with an exception for business obtained through competitive bidding, a larger *de minimus* threshold, and a shorter look-back period;
- The release should reiterate that the rule would not apply to advisers of insurance products or mutual funds issued to governmental entities because the adviser has a contract with the insurance company or mutual fund, not the governmental entity; and,
- Participation in state legislative and administrative actions is more important for life insurers than other financial institutions primarily subject to federal regulation. ACLI noted that it was important, therefore, for the SEC to reiterate the permissibility of investment advisers' contributions to PACs with independent governance through boards, committees, operative guidelines or principles.

[9] This sentiment is drawn directly from the Guide text cited in footnote 3 *supra*.
[10] *See* release at text preceding footnote mark 79.
[11] *See* release at III. In 1999, we commented on the initial and on-going compliance costs of the proposal, which are noted at footnote 226. As in 1999, it is proper that the cost-benefit analysis can be honestly scrutinized to assure rulemaking that fairly balances benefits against burdens. It will take time to parse the economic impact of the initiative on life insurers' operations, especially where the 2009 proposal imposes different requirements and prohibitions.

- Regulatory Flexibility Act analysis;[13]
- Effects on Competition, Efficiency and Capital Formation[14]
- Evaluation of the problems sought to be addressed against the standards of the SEC's Data Quality Assurance Guidelines.[15]

We would appreciate the reasonable opportunity to review and respond to these important, statutory requirements and practical realities of the proposal. An extended comment period would enable scrutiny and input in response to these matters.

An extended comment period is also justified because the proposal occurs coextensively with a number of other significant regulatory and statutory initiatives demanding the attention of life insurers' personnel with securities and compliance expertise, such as, among other things:

- The Administration's regulatory reform initiative[16], especially
    - o Title V-Office of National Insurance;
    - o Title VII- Over-the-Counter Derivatives Markets Act of 2009;
    - o

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[12] See release at Section IV. The SEC's narrative addressing the elements of the Paperwork Reduction Act is incisive and based on a number of assumptions concerning the initiative's impact of recordkeeping. Implicit in the estimates presented are projections of ministerial recordkeeping burdens. The release concludes that the revisions to Rule 204-2 would create increased burdens of approximately two hours per SEC registered investment adviser with governmental clients. This may underestimate the compliance and oversight necessary to accurately fulfill the rule's recordkeeping requirements. In any event, scrutiny of these estimates can be time consuming for commentators, especially in view of the diversity of operations.

[13] *See* release at Section V. Among other things, the release provides an estimate of the small entities subject to the proposal, and concludes that

> "[w]e do not have data and are not aware of any databases that compile information regarding how ma[n]y (sic) advisers that are exempt from registrations with the Commission in reliance on section 203(b)(3)of the Advisers Act and that have State of local government clients. It is unclear how many of these advisers that are exempt from registration that would be subject to the rule are small advisers for purposes of this analysis." *See* release at Section V(C).

We commend the SEC's unequivocal candor, but note that the initial regulatory flexibility analysis may be incomplete and may require substantial time for commentators that elect to address the impact of the proposal on the unknown universe of smaller advisers.

[14] *See* release at Section VI. In fulfillment of the mandate of Section 204 of the Advisers Act, the Release considers whether the initiative is necessary or appropriate in the public interest and whether the action will promote efficiency, competition, and capital formation. The release concludes that

> We believe that the proposed amendments to the Advisers Act *recordkeeping rule would not materially increase* the compliance burden on advisers….Similarly, we *do not believe* that the proposed amendments to *the recordkeeping rule would disproportionately affect* advisers with government entity clients ….All registered advisers are already subject to a variety of recordkeeping requirements in the course of their business and, therefore, the proposed amendments to the recordkeeping *rule should not affect efficiency*. *See* release at Section VI. Emphasis added.

We cannot necessarily agree with the judgments and conclusions reflected in these statements without careful scrutiny of the rule's direct and collateral impact, which will take a matter of time. For example, as the release aptly notes, "several States, counties, localities, and even individual public pension funds, have undertaken to prohibit or regulate these [pay-to-play] practices in recent years." Many disparities exist in the patchwork of state and local pay-to-play requirements that are costly and compliance inefficient. The release does not appear to have evaluated the compliance costs of redundant or conflicting requirements that could occur between the initiative and requirements of states, counties, localities and public pension funds.

[15] *See* http://www.sec.gov/about/dataqualityguide.htm. These guidelines indicate that the SEC "takes pride in the quality of its information and is committed to disseminating information that meets the Commission's already rigorous standards for objectivity, integrity and utility." The release's identification of the scope of abuse appears to be derived, in part, from some sources external to the SEC, such as general circulation newspaper stories that should be open to reasonable scrutiny. The weight and caliber of such independent news sources in a major rulemaking initiative should be carefully examined. Commentators should have the opportunity to evaluate under the Data Quality Assurance Guidelines the release's related statement that "*it has become increasingly clear that pay to play is a significant problem* in the management of public funds by investment advisers".

[16] *See* Department of Treasury fact sheet on the initiative. The Department of Treasury Report, an eighty-nine page document, appears at http://www.financialstability.gov/docs/regs/FinalReport_web.pdf.

    - Title IX- Investor Protection Act of 2009 (dealing with a harmonized standard of care for investment advisers and broker-dealers in recommendations to purchase or sell securities); and,
    - Title X - Consumer Financial Protection Agency Act of 2009;
- FINRA's ambitious and complex initiatives to consolidate and harmonize NYSE and NASD rules of conduct;[17]
- Reopening of the comment period for further input on the SEC's proposed restrictions on short selling[18];

This small sample of coextensive securities regulatory and statutory initiatives alone should warrant an enlarged comment period for the pay-to-play proposal.

**Conclusion**

Neither the APA[19] nor the SEC's rules of conduct establish a "standard" period of comment on rulemakings. Rather, the goal of robust public comment on administrative rulemakings is best served by selecting a time period based on the unique factors and complexity of the individual initiative, and not "routine" practices. Some proposals should properly have longer comment periods than others.

In this instance, an extended comment period of 60-90 days will promote the most informed feedback given the size and diversity of ACLI's membership, as well as the profound complexity and importance of the issues under examination. The depth and quality of comment is simply a higher priority than the speed of completing the project.

Unlike rapidly evolving marketplace or enforcement developments warranting abbreviated comment periods, there is no urgent emergency in this rulemaking. The original "pay-to-play" proposal in 1999 experienced a ten-year hiatus before the current initiative on the same subject matter arose. In comparative context, an extension of the comment period is reasonable and warranted.

ACLI has actively and constructively participated in numerous SEC rulemaking initiatives over many years. We will likewise devote substantial resources and time in developing policy positions and providing useful feedback. Our consensus-based process is neither dilatory nor obstructionist. Our request for a comment extension will allow the most useful feedback on this significant initiative.

We fully understand the SEC's concerns about appropriate conduct by investment advisers to state and local pension, retirement, and 529 plans. While it is important to resolve the regulatory issues under scrutiny, it is more important to execute rulemaking wisely within a deliberative process allowing proper identification of issues and development of recommended solutions.

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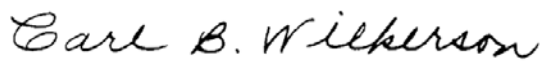
[17] The scope of the FINRA process is outlined on the organization's website at and can be visualized in the rule conversion chart (at http://www.finra.org/Industry/Regulation/FINRARules/p085560) highlighting numerous rules that have been consolidated. Not only are securities professionals investing time in evaluating the revised and consolidated proposals, but they are also must overhaul compliance and administrative systems.

[18] *See* Release No. 34–60509; File No. S7–08–09 in 74 Fed. Reg. 160 (Aug. 20, 2009.)

[19] *See* Guide at 196.

For all of the reasons stated above, we respectfully request that the comment period be extended for 60-90 days after the October 6, 2009 comment deadline. We greatly appreciate the courtesy of the staff and the Commission in evaluating our request. Please let me know if we can provide any additional background, or answer any questions that may develop.

Sincerely,



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