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Via Securities and Exchange Commission Website

<http://www.sec.gov/>

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

Re: File Number S7-45-10

Ladies and Gentlemen:

This letter is in response to the Security and Exchange Commission's (the "Commission") request for comments to Proposed Rules 15Ba1-1 through 15Ba1-7 (collectively the "Rules") published in the Federal Register on January 6, 2011.¹ The Rules are intended to give effect to Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act² (the "Dodd-Frank Act"). The comments in this letter request the Commission to exclude from the Rules public pension plans and other retirement plans sponsored by governmental employers, such as 403(b) plans³ and 457 plans⁴ (collectively "Governmental Retirement Plans"), as well as individuals who serve on administrative committees of Governmental Retirement Plans.

Background

Securities Exchange Act of 1934

Section 975 of the Dodd-Frank Act ("Section 975") amended Section 15B(a) of the Securities Exchange Act of 1934 (the "Exchange Act") to make it "unlawful for a municipal advisor to provide 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 to undertake a solicitation of a municipal entity or obligated person, unless the municipal advisor is registered in

¹ Registration of Municipal Advisors, 76 Fed. Reg. 824 (January 6, 2011).

² Pub. L. No. 111-203, 103 Stat. 440 (2010).

³ For purposes of this letter, the term "403(b) plan" refers to plans established pursuant to Section 403 of the Internal Revenue Code of 1986, as amended (the "Code").

⁴ For purposes of this letter, the term "457 plan" refers to plans established pursuant to Section 457 of the Code.

accordance with this subsection [15 U.S.C. § 78o-4(a)(1)(B)].” A “municipal advisor” includes “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 ... with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues.”⁵ A “municipal entity” means “any State, political subdivision of a State, or municipal corporate instrumentality of a State,” including “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.”⁶ The term “municipal financial product” means “municipal derivatives, guaranteed investment contracts, and investment strategies.”⁷ The term “investment strategies” is defined 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.”⁸

The Commission’s Interpretation

The Commission broadly interprets Section 15B(a) of the Exchange Act (as amended by Section 975) to apply to Governmental Retirement Plans, as well as certain individuals serving on or providing services to such plans. The Commission takes the position that a “municipal entity” includes public pension funds and “participant-directed investment programs or plans such as 529, 403(b), and 457 plans.”⁹ According to the Commission, Congress intended to include within 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 ... public pension plans.”¹⁰ Although the Commission recognizes that such plans, programs, and pools of assets are generally funded from sources other than proceeds of municipal securities, 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.”¹¹ However, the Commission believes persons serving as elected members of the governing body of a public pension fund, 403(b) plan, or 457 plan are “employees” and therefore not municipal advisors.¹²

The Commission also broadly interprets the definition and application of “investment strategies.” The Exchange Act defines the term “investment strategies” 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

⁵ 15 U.S.C. § 78o-4(e)(4).

⁶ § 78o-4(e)(8)(B).

⁷ § 78o-4(e)(5).

⁸ § 78o-4(e)(3) (emphasis added).

⁹ 76 Fed. Reg. 824, 829.

¹⁰ *Id.* at 830.

¹¹ *Id.*

¹² *Id.* at 834.

municipal escrow investments.”¹³ Despite the plain language of the statute, the Commission interprets the term “investment strategies” 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 an exclusion applies.¹⁴ Under the Commission’s interpretation, Governmental Retirement Plans constitute “investment strategies.”

State, not Federal, Law Generally Governs Governmental Retirement Plans

Federal law generally exempts Governmental Retirement Plans from regulations that apply to private pensions and retirement plans. The Employee Retirement Income Security Act of 1974, as amended (“ERISA”), generally governs pension and retirement plans and establishes fiduciary duties.¹⁵ Title I of ERISA establishes reporting, disclosure, participation, vesting, funding, fiduciary responsibilities, administration, and enforcement requirements for pension and other retirement plans. However, Congress exempted governmental plans from Title I of ERISA¹⁶ because of concerns relating to federalism, state and local sovereignty, and the greater need to protect pensions in the private sector.¹⁷ Subsequent efforts to increase federal regulation of state and local government pension plans, such as the Public Employee Retirement Income Security Act (“PERISA”) and the Public Employee Pension Plan Reporting and Accountability Act (“PEPPRA”), failed.¹⁸

States and political subdivisions may, if properly authorized by state statute, establish defined benefit pension plans and/or other retirement plans for the benefit of their employees. One commentator notes the “operation of governmental plans is significantly controlled by state and local constitutional and contractual law. Benefit formulas, forms of benefits, age, service, vesting, and contribution requirements are often set out by statute ... and greatly vary from jurisdiction to jurisdiction.”¹⁹ State constitutions typically authorize political subdivisions to establish and maintain pension plans or other retirement plans for employees.²⁰ State statutes specify the types of pension and retirement plans political subdivisions may establish, as well as governance, reporting and oversight requirements for such plans.²¹

¹³ 15 U.S.C. § 78o-4(e)(3) (emphasis added).

¹⁴ 76 Fed. Reg. 824, 830.

¹⁵ See ERISA §§ 4, 404.

¹⁶ ERISA § 4(b)(1). “Governmental plans” are defined to include “a plan established or maintained for its employees ... by the government of any State or political subdivision thereof.” ERISA § 3(32).

¹⁷ *Feinstein v. Lewis*, 466 F. Supp. 1256, 1261-62 (S.D.N.Y. 1979) (citations omitted).

¹⁸ DAVID W. POWELL, CHURCH AND GOVERNMENTAL PLANS, 372-3rd Tax Mgmt. (BNA), at A-1 (2008).

¹⁹ *Id.*

²⁰ See, e.g., NEB. CONST. art. XV, § 17; OKLA. CONST. art. V, §§ V-41, V-61, and V-62.

²¹ See, e.g., NEB. REV. STAT. §§ 14-2111 and 23-2301 *et seq.*; IOWA CODE §§ 97B.1 *et seq.*; KAN. STAT. ANN. §§ 74-4901 *et seq.*

Issues and Recommendations

Interpretation of "Municipal Entity" to Encompass Governmental Retirement Plans

The Commission solicited comments regarding whether its interpretation of "municipal entity" to include public pension funds and participant-directed investment programs such as 403(b) and 457 plans is appropriate.²² We request the Commission clarify its interpretation of "municipal entity" and establish regulatory guidance that excludes Governmental Retirement Plans from the definition of "municipal entity."

We appreciate the Commission's openness to excluding Governmental Retirement Plans from the definition of "municipal entity" and, by extension, the Exchange Act's and Rules' registration requirements. Governmental Retirement Plans should be excluded from the definition of "municipal entities" for purposes of the Rules and § 78o-4(a)(1)(B) because Congress did not intend for Section 975 to apply to such plans. In adopting Section 975, Congress intended to regulate sophisticated financial transactions, such as the issuance of securities, the use of derivatives, and investments of bond proceeds, involving states, cities, and other political subdivisions.²³ Congress sought to regulate financial advisors, investment brokers, and other financial intermediaries in the municipal securities market to promote fairness and market efficiencies.²⁴ Governmental Retirement Plans are not typically engaged in the types of transactions Congress contemplated when it enacted Section 975. Because Congress specifically referred to states, counties, cities, and other political subdivisions, but not their pension or retirement plans, when it enacted Section 975, the Commission should exclude Governmental Retirement Plans from the definition of "municipal entity."

Similarly, Governmental Retirement Plans should be excluded from the definition of "municipal entity" because they are separate legal entities that are not ordinarily funded by or involved in the types of transactions contemplated by Section 975 and the Rules. Governmental pension plans are established by statute and/or a written plan document and receive contributions from the employer and employees.²⁵ Assets of plans intended to be qualified under Internal Revenue Code § 401(a) (including most governmental defined benefit plans and all grandfathered 401(k) plans) must be held in trust for the benefit of employees and their beneficiaries.²⁶ Qualified plan trusts maintained by governmental employers are prohibited from engaging in prohibited transactions, including self-dealing with the plan sponsor.²⁷ Qualified governmental excess benefit arrangement trusts established under Internal Revenue Code § 415(m) are "maintained solely for the purpose of providing benefits."²⁸ Federal law requires a written 403(b) plan document and that the plan be operated in accordance with it.²⁹

²² 76 Fed. Reg. 824, 835.

²³ S. REP. NO. 111-176, at 147-48 (2010).

²⁴ *Id.* at 148.

²⁵ See *supra* notes 20 and 21.

²⁶ Code § 401(a)(1).

²⁷ Code § 503(a)(1)(B).

²⁸ Code § 115.

²⁹ Treas. Reg. § 1.403(b)-3(b)(3).

Governmental 403(b) plans are typically funded with employee salary reductions and/or employer contributions.³⁰ Contributions to governmental 403(b) plans are used to purchase fixed or variable annuity contracts or are deposited in custodial accounts, the assets of which are invested in mutual funds.³¹ In general, 457 plans are established by a written document and allow employees of political subdivisions to defer compensation.³² By definition, contributions to 457 plans are from employees' compensation, not proceeds from municipal securities. For eligible governmental 457 plans, "all amounts deferred under the plan, all property and rights purchased with such amounts, and all income attributable to such amounts, property, or rights, must be held in trust³³ for the exclusive benefit of participants and their beneficiaries."³⁴ Governmental Retirement Plans and their related trusts or custodial accounts are separate and distinct legal entities from their sponsors that do not engage in the types of transactions contemplated by Section 975 and the Rules. Therefore, the Commission should exclude Governmental Retirement Plans from the definition of "municipal entity."

Interpretation of "Investment Strategies" to Encompass Governmental Retirement Plans

The Commission has solicited comments regarding whether it should exclude from the definition of "investment strategies" plans, programs, or pools of assets that invest funds held by or on behalf of a municipal entity that are not proceeds of the issuance of municipal securities.³⁵ We request the Commission clarify its interpretation of "investment strategies" and establish regulatory guidance that excludes Governmental Retirement Plans from the definition of "investment strategies."

We appreciate the Commission's request for comments regarding whether it should exclude from the definition of "investment strategies" plans, programs, or pools of assets (such as Governmental Retirement Plans) that invest funds held by or on behalf of a municipal entity that are not proceeds of the issuance of municipal securities. If Governmental Retirement Plans are "investment strategies," they fall within the definition of a "municipal financial product."³⁶ Thus, "municipal advisors" providing advice to or on behalf of a Governmental Retirement Plan would be required to register under § 780-4(a)(1)(B) and the Rules.

The Commission's interpretation of "investment strategies" to encompass Governmental Retirement Plans ignores the plain language of the Exchange Act. The Exchange Act defines "investment strategies" 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."³⁷ For a "plan or program"

³⁰ Code § 403(b)(1)(E) and flush language.

³¹ See Code § 403(b)(7); Treas. Reg. § 1.403(b)-8.

³² Code § 457(b)(2); Treas. Reg. § 1.457-3(a).

³³ The trust must be established pursuant to a written agreement that constitutes a valid trust under state law. Treas. Reg. § 1.457-8(a)(2)(i).

³⁴ Treas. Reg. § 1.457-8(a)(1). Treasury Regulations permit certain custodial accounts and annuity contracts to satisfy the trust requirement. Treas. Reg. § 1.457-8(a)(3)(i).

³⁵ 76 Fed. Reg. 824, 835.

³⁶ See 15 U.S.C. § 780-4(e)(5).

³⁷ § 780-4(e)(3) (emphasis added).

to be an “investment strategy” under the Exchange Act, the plan or program must invest the proceeds of municipal securities.³⁸ As the Commission itself recognizes,³⁹ Governmental Retirement Plans do not ordinarily invest the proceeds of municipal securities.⁴⁰ Defined benefit pension plans are funded through employee salary reductions and employer contributions. Similarly, 403(b) plans and 457 plans are funded with employee salary reductions and employer contributions.⁴¹ The Commission’s interpretation of the definition of “investment strategies” to include Governmental Retirement Plans clearly exceeds the statutory language of the Exchange Act.

Because Governmental Retirement Plans are not ordinarily funded with proceeds of municipal securities, the Commission should reconsider its interpretation of “investment strategies.” Specifically, Governmental Retirement Plans should not be considered “investment strategies” unless the employer funds such plans with proceeds from the issuance of pension obligation bonds. We respectfully request the Commission to follow the plain language of § 78o-4(e)(3) and exclude from the definition of “investment strategies” Governmental Retirement Plans that are not funded with the proceeds of pension obligation bonds.

Municipal Advisors and Governmental Retirement Plan Committees

The Commission has solicited comments regarding its interpretation of the definition of “municipal advisor” and asked whether its interpretation should be modified or clarified.⁴² Similarly, the Commission has inquired whether other exclusions from the definition of “municipal advisor” should exist.⁴³ We request the Commission clarify its interpretation of “municipal advisor” and establish regulatory guidance that excludes from the definition of “municipal advisor” individuals who serve on committees the plan sponsor establishes to oversee the administration of Governmental Retirement Plans.

Of great concern to Governmental Retirement Plans and individuals serving on various administrative and governance committees for such plans is the definition of “municipal advisor.” Under the Exchange Act, a “municipal advisor” includes “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 ... with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues.”⁴⁴ The Commission interprets Governmental Retirement Plans to fall within the definition of a “municipal entity.”⁴⁵ In its discussion of

³⁸ § 78o-4(e)(3).

³⁹ 76 Fed. Reg. 824, 830 (noting that public pension plans receive contributions from employees and state and local government employers).

⁴⁰ A small minority of governmental employers have issued pension obligation bonds to satisfy employer contributions to public pension funds. However, it is not standard practice for governmental employers to issue pension obligation bonds and contribute the proceeds to fund Governmental Retirement Plans.

⁴¹ See *supra* notes 30 and 32.

⁴² 76 Fed. Reg. 824, 835.

⁴³ *Id.* at 838.

⁴⁴ 15 U.S.C. § 78o-4(e)(4).

⁴⁵ 76 Fed. Reg. 824, 829.

“municipal advisors,” the Commission implies that individuals who provide advice with respect to municipal financial products (such as Governmental Retirement Plans)⁴⁶ will be required to register with the Commission.⁴⁷ However, municipal entity employees and elected individuals of municipal entities are not considered “municipal advisors” and are thus not subject to the registration requirements.⁴⁸

The board of directors of a political subdivision typically establishes one or more committees to perform various administrative functions for a Governmental Retirement Plan (“Governmental Retirement Plan Committees”). For example, for individual account plans such as 403(b), 457, and grandfathered 401(k) plans, the board of directors may establish an investment committee and delegate certain tasks to it. The investment committee may be composed of employees of the political subdivision, elected members from the general public, and/or individuals who are not employees but are appointed by the board of directors or selected by the other members of the committee. The investment committee selects investment alternatives for the plan, hires and evaluates outside consultants to the plan (such as investment advisors and record keepers), examines outside consultants’ fees, conveys information to a directed trustee, and prepares and approves employee communications. Similarly, for pension plans, the board of directors designates an investment committee to evaluate and make recommendations regarding retaining investment advisors, review the performance of investment advisors, and terminate investment advisors.

Individuals serving on Governmental Retirement Plans Committees do not perform the types of services of concern to the Commission. The Commission notes that “municipal advisors” are “distinct groups of professionals that offer different services and compete in different markets.”⁴⁹ According to the Commission, the “three principal types of municipal advisors” are (1) financial advisors, (2) independent advisors that advise municipal pension funds on the investment of funds held “by or on behalf of municipal entities,” and (3) third-party marketers and solicitors.⁵⁰ The types of municipal advisors the Commission identified are outside professionals who provide services to a Governmental Retirement Plan for a fee. The legislative history of the Dodd-Frank Act suggests Congress did not intend for “municipal advisors” to include individuals serving on Governmental Retirement Plans Committees. The Senate Report on Section 975 reflects the understanding that 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.”⁵¹ Notably, the Senate Report does not discuss the need to regulate as “municipal advisors” individuals serving on Governmental Retirement Plan Committees. Similarly, testimony before the Senate Committee on Banking, Housing, and Urban Affairs indicates the municipal advisor registration requirements were intended to apply only to professionals who provide “advice to issuers regarding bond offerings or investment

⁴⁶ See *supra* note 36 regarding how the Commission’s interpretation of “municipal financial products” implicates Governmental Retirement Plans.

⁴⁷ See 76 Fed. Reg. 824, 828-29.

⁴⁸ *Id.* at 834; 15 U.S.C. § 78o-4(e)(4)(A).

⁴⁹ 76 Fed. Reg. 824, 829.

⁵⁰ *Id.*

⁵¹ S. REP. NO. 111-176, at 147-48.

brokers that assist issuers with investing bond proceeds.”⁵² Testimony regarding the regulation of municipal advisors specifically focused on financial advisors, investment brokers, swap advisors, and other intermediaries, not individuals serving on Governmental Retirement Plan Committees.⁵³ The legislative history is void of any indication that Congress intended for individuals serving on Governmental Retirement Plan Committees to be treated as “municipal advisors” and required to register as such. Therefore, we request the Commission establish regulatory guidance that exempts from the definition of “municipal advisor” and, consequently, the Rules’ registration requirements, individuals serving on Governmental Retirement Plan Committees.

Municipal Advisors and Bank Trustees

The Commission has solicited comments regarding whether banks and trust companies (“Banks”) should be excluded from the definition of “municipal advisor” when they provide fiduciary services to municipal entities, such as acting as trustees with respect to governmental pension plans.⁵⁴ We request the Commission establish regulatory guidance that excludes from the definition of “municipal advisor” Banks that act as directed trustees of Governmental Retirement Plans.

Regulatory guidance should exclude from the definition of “municipal advisor” Banks that act as directed trustees of Governmental Retirement Plans. In the context of pension plans, fiduciary services include exercising any discretionary control or authority respecting the management of the plan, exercising any authority or control respecting the management or disposition of plan assets, rendering investment advice for a fee or other compensation with respect to plan assets, or having discretionary authority or responsibility in the administration of a plan.⁵⁵ Although plan trustees are fiduciaries,⁵⁶ a directed trustee who follows the instructions of another fiduciary or is a custodian of plan assets is not necessarily a fiduciary.⁵⁷

A Governmental Retirement Plan frequently employs a Bank as directed trustee to perform ministerial duties with respect to the plan. Directed trustees are required to follow the proper directions of the plan administrator. Banks, acting as directed trustees, have little, if any, actual discretion over the plan or its assets. Under the Exchange Act, a “municipal advisor” includes “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 ... with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues.”⁵⁸ By

⁵² *Enhancing Investor Protection and the Regulation of Securities Markets – Part II Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 24 (2009) (statement of Ronald A. Stack, Chair, Municipal Securities Rulemaking Board).

⁵³ *Id.* at 24-25, 30-31, 38-39.

⁵⁴ 76 Fed. Reg. 824, 837.

⁵⁵ See ERISA § 3(21)(A).

⁵⁶ ERISA § 403(a); Department of Labor Field Assistance Bulletin 2004-03 (Dec. 17, 2004).

⁵⁷ ERISA § 403(a)(1).

⁵⁸ 15 U.S.C. § 78o-4(e)(4) (emphasis added).

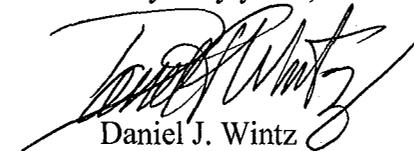
definition, directed trustees do not provide advice to Governmental Retirement Plans regarding municipal financial products or the issuance of municipal securities. Instead of providing advice, directed trustees take direction from the plan administrator in accordance with the plan document. Therefore, the Commission should issue regulatory guidance that excludes from the definition of "municipal advisor" Banks that act as directed trustees of Governmental Retirement Plans.

Municipal Advisors and Actuaries

The Commission has solicited comments regarding whether other exclusions from the definition of "municipal advisor" should exist.⁵⁹ We request the Commission clarify its interpretation of "municipal advisor" and establish regulatory guidance regarding whether the definition of "municipal advisor" includes actuaries who perform actuarial and/or consulting services to Governmental Retirement Plans. Similarly, the Commission should issue regulatory guidance regarding whether actuaries who perform actuarial and/or consulting services for certain other governmental benefit plans and trusts result in the actuary being a "municipal advisor." For example, the Commission should clarify whether actuaries are "municipal advisors" when they perform actuarial and/or consulting services for retiree medical plans, voluntary employee benefit associations and related trusts ("VEBAs"),⁶⁰ and other post-employment benefits ("OPEB") plans and trusts, including those established under Internal Revenue Code § 115.

We appreciate the Commission's consideration of these issues and are happy to discuss them further with any member of the Commission's staff.

Very truly yours,



Daniel J. Wintz
P. Brian Bartels
FOR THE FIRM

⁵⁹ 76 Fed. Reg. 824, 838.

⁶⁰ See Code § 501(c)(9).