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February 22, 2011

Via E-mail (rule-comments@sec.gov)

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

Subject: File Number S7-45-10: *Registration of Municipal Advisors,* Proposed Rule 17 CFR Parts 240 and 249 (Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act)

Dear Ms. Murphy:

On behalf of our member companies, the American Council of Life Insurers ("ACLI") submits the following comments in response to proposed Rule 17 CFR Parts 240 and 249 [File No. S7-45-10], *Registration of Municipal Advisors* (the "proposed rule"), the stated intent of which is to implement Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act") that has been incorporated into Section 15B of the Securities Exchange Act of 1934, as amended (the "Exchange Act").

ACLI represents over 300 member companies that are leading providers of financial and retirement security products covering individual and group markets. They provide life, disability income, and long-term care insurance; annuities; retirement plan products and services; and reinsurance. ACLI members account for over 90% of the premiums and assets of the life insurance and annuities industry in the United States. Products issued by ACLI members include employer-sponsored group policies and contracts.

ACLI member companies generally are subject to product, operational, market conduct, and solvency regulation by the States. The vast majority of products sold by ACLI members in the group employee benefits market are subject to the requirements of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Variable products offered by ACLI members are subject to the requirements of the Securities and Exchange Commission ("SEC"or the "Commission"). Broker-dealers affiliated with life insurers are regulated under the Exchange Act, and investment advisers are regulated under the Investment Advisers Act of 1940 (the "Advisers Act").

In submitting these comments, ACLI has reviewed comments of the Committee of Annuity Insurers ("CAI"). ACLI fully supports the comments of CAI and urges their consideration by the Commission.

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- **The SEC should restrict its interpretation of municipal securities and investment strategies covered by Section 15B of the Exchange Act to the plain terms of the Dodd-Frank Act.**

The Dodd-Frank Act amends the Exchange Act as follows:

> It shall be 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 accordance with this subsection. (emphasis added)

Contrary to the provisions of the proposed rule, the Dodd-Frank Act did not change the definition of "municipal securities." It remains defined under the Exchange Act as "securities which are direct obligations of, or obligations guaranteed as to principal and interest by, a state or any political subdivision thereof, or any agency or instrumentality of a state or political subdivision thereof, or any municipal corporate instrumentality of one or more states, or any security which is an industrial development bond…" Likewise, the Dodd-Frank Act did not change the definition of "security," which remains any note, stock, Treasury stock, security feature, or other instrument commonly known as a security.

As noted by the Commission, the Dodd-Frank Act did extend the authority of the SEC to "municipal financial products." *That term* is specifically defined in the Act as "municipal derivatives, guaranteed investment contracts and investment strategies." The term "investment strategies" is also specifically defined in the Act: "plans or programs for the investment of the proceeds of municipal securities that are not derivatives, guaranteed investment contracts and the recommendation of and brokerage of municipal escrow accounts." (emphasis added)

The Commission misinterprets the Dodd-Frank Act, which is clear on this point: the definition of "municipal entity" was intended to encompass a plan, program, or pool of assets sponsored or established by a State and, in so doing, capture for appropriate oversight a previously-unregulated universe of advisors thereto. The Act *was not* intended to expand the type of assets subject to the authority of the SEC or to duplicate existing regulatory regimes adopted by the Congress. It is similarly clear in the Act that the plans and programs intended to be covered under the term "investment strategies" *must* relate to the proceeds of municipal securities as that term is specifically defined under the current provisions of the Exchange Act.

Accordingly, state and municipal employee pension plans, 529 plans and assets invested by States and municipalities were never intended to be regulated by the Commission under the Exchange Act or the Dodd-Frank Act, nor were their service providers or insurers who issue insurance contracts to them. "Municipal securities" rules were, and remain, intended to regulate the issuance of investment instruments by a municipal entity under which the entity is required to pay an investor pursuant to the terms of the instruments. In the absence of an unequivocal declaration by the Congress to substantively revise core elements of ERISA and State insurance law, ACLI urges the Commission to appropriately restrict its interpretation of municipal securities and investment strategies under the Exchange Act to the plain meaning of the terms as set forth in the Dodd-Frank Act.[1]

- **The term "municipal advisor" should not include broker-dealers affiliated with life insurers.**

The proposed rule fits broker-dealers affiliated with life insurers poorly, perhaps because the initiative draws from the MSRB rule as a template. The broker-dealers subject to the MSRB regulatory structure are different from the full universe of broker-dealers, and especially the limited-purpose broker-

[1] See CAI letter, Feb. 22, 2011, for further commentary on these and related concerns regarding separate accounts.

dealers affiliated with life insurers. A brief summary of the range of products and services typically offered by insurance affiliated firms will highlight these differences and the remote nexus that insurance broker-dealers have with the issues within the proposed rule's purpose.

Broker-dealers affiliated with life insurance companies are significantly different from full service or "wire-house" broker-dealers in their operations, products and services. The securities activities of broker-dealers affiliated with life insurers are a component of a larger insurance business. Many registered representatives operate principally as life insurance and annuity salespersons. Securities sales frequently constitute an incidental amount of business relative to insurance product sales by an office or registered representative.

As a by-product of this relationship, supervision and compliance is often conducted through the vehicle of an insurance distribution system. The range of products offered by these limited purpose broker-dealers is typically narrow and focuses upon the distribution of variable insurance contracts and mutual funds.

It may be helpful to consider those securities activities and services *not* offered by most broker-dealers affiliated with life insurers. Typically, these firms do not maintain discretionary accounts permitting registered representatives to purchase and sell securities on behalf of a client without specific approval of each transaction. On an industry-wide basis, these broker-dealers generally do not take custody of client funds, securities or assets. This type of firm does not typically "carry" customer accounts.

Insurance broker-dealers usually require that payment for variable insurance or securities products be made by check payable to the processing office of the underwriting insurer, and not by check payable to the agent/registered representative or even to the broker-dealer. Additional purchases, transfers, withdrawal and redemption requests for these products are submitted to the underwriting insurer, not to the representative or the firm. Variable contracts and shares in investment companies are issued directly to purchasers and do not constitute bearer instruments. Consequently, the opportunity for misappropriation of these instruments by registered representatives is virtually nonexistent.

Broker-dealers affiliated with life insurers generally do not maintain "open accounts" or facilitate the implementation of stop orders and limit orders, which obviates many potential brokerage problems. Similarly, because these broker-dealers do not typically make available cash management accounts or manage free cash balances, many associated operational and logistical difficulties are absent. Broker-dealers affiliated with life insurers do not make markets in securities or underwrite new issues of securities. These limited-purpose broker-dealers do not facilitate securities purchased on margin or through the extension of credit to customers.

In sum, insurance affiliated broker-dealers are quite different from municipal securities broker-dealers on which the proposed rule was built, in part. They primarily elicit orders from variable contract and mutual fund purchasers. In these limited roles, the purpose and application of the proposed rule is not triggered. Accordingly, the term "municipal advisor" should not include these persons.[2]

- **As a precursor to a new system of records, the proposed rule fails to conform to standards for appropriate rule-making set forth by the President and interpreted by the Office of Management and Budget.**

Section 3 of Executive Order 13563 advocates that the heads of executive departments and agencies, and of independent regulatory agencies, provide for "[g]reater coordination across agencies"

[2] See CAI Letter, Feb. 22, 2011, for commentary on related concern regarding investment advisers affiliated with life insurers.

to produce simplification and harmonization of rules.[3] As further guidance as to the instructions of E.O. 13563, the Office of Management and Budget has stated:

> *This provision complements related provisions of Executive Order 12866*, such as the provision asking each agency to "tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, *the cost of cumulative regulations*." (emphasis added)[4]

The OMB guidance further states, in pertinent part:

> Section 3 thus emphasizes the crucial importance of simplifying and harmonizing regulations and acknowledges that, at times, *regulated entities might be subject to requirements that, even if individually justified, may have cumulative effects imposing undue, unduly complex, or inconsistent burdens.* (emphasis added)[5]

ACLI supports the goals of the Dodd-Frank Act and the proposed rule. ACLI also appreciates the commitment of staff resources necessitated by the comprehensive scope of the Act.

Nonetheless, as a precursor to a new system of records and due to the expansive interpretation of the Act in this instance by the Commission, the Commission has significantly underestimated the complexity and costs associated with the proposed rule, particularly given the concerns detailed in this letter. Clear notice is lacking in the proposed rule of the line between permissible and impermissible conduct that will drive up costs from cautious efforts to "over-comply" rather than risk inadvertent violations. More importantly, the assessment of regulatory cost appears to minimize the very real, cumulative impact of grafting municipal advisor regulations onto multiple other regulatory regimes to which life insurers and their affiliated broker-dealers are subject.

As noted at the outset, ACLI member companies generally are subject to product, operational, market conduct, and solvency regulation by the States. The vast majority of products sold by ACLI members in the group employee benefits market are subject to the requirements of ERISA. Variable products offered by ACLI members are subject to the requirements of the Commission. Broker-dealers affiliated with life insurers are regulated under the Exchange Act, and investment advisers are regulated under the Advisers Act. There is no compelling, rational justification for the proposed rule sufficient to find these regulatory regimes deficient or to warrant unreasonably subjecting life insurers and their broker-dealers to the proposed rule's overbroad provisions and significant associated costs.

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ACLI appreciates the opportunity to comment on the proposed *Registration of Municipal Advisors* rule. We would be happy to discuss our concerns in greater detail in future correspondence or meetings.

Sincerely,

[3] E.O. 13563, 76 F.R. 3812 (Jan. 21, 2011)
[4] E.O. 12866, 76 F.R. ___ (Oct. 4, 1993), as amended
[5] OMB Memorandum M-11-10, "Executive Order 15563, Improving Regulation and Regulatory Review" (Feb. 2, 2011)