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February 22, 2011

VIA Electronic Mail

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

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

Dear Ms. Murphy:

This letter is submitted on behalf of our client, the Committee of Annuity Insurers[1] (the "Committee"). The Committee appreciates the opportunity to offer its comments in response to the request for comments by the U.S. Securities and Exchange Commission (the "Commission") in *Registration of Municipal Advisors* (the "Proposing Release").[2] The Proposing Release requests 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."

The Committee has serious concerns about the scope of the Proposed Rules and interpretations expressed in the Proposing Release, as they may impact issuers and sellers of annuity contracts and other types of insurance contracts ("Insurance Contracts") that serve as funding vehicles for retirement plans established by municipal entities, and investment advisers who provide advice in connection with such Insurance Contracts or their underlying investment vehicles. As set forth in more detail below, these issuers, sellers and investment advisers are already subject to regulation, respectively, as insurance companies under state insurance law, broker-dealers under the Exchange Act and investment advisers under the Investment Advisers

[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.

Act of 1940, as amended (the "Advisers Act"), for their activities in regard to Insurance Contracts. The Committee is concerned that Proposed Rule 15Ba1-1 would impose another layer of regulation on these persons for the very same activity that is already subject to robust regulation. The Committee believes that such a result is not intended by the Dodd-Frank Act. To the contrary, Section 975 of the Dodd-Frank Act was enacted to impose a registration requirement on persons providing advisory services to municipal entities or soliciting municipal entities to retain municipal advisory services who were not otherwise required to register for those activities or otherwise regulated.

More particularly, the Committee believes that the Proposed Rules raise significant concerns for insurance companies issuing Insurance Contracts to retirement plans established by municipal entities ("governmental retirement plans"), for investment advisers managing investment options embedded within the Insurance Contracts and for broker-dealers marketing the Insurance Contracts. In light of these concerns, the Committee offers the following comments and recommendations:

- The term "investment strategies" should not encompass insurance company separate accounts for group annuity contracts held by municipal entity retirement plans.

- Municipal advisor registration should not apply to SEC-registered investment advisers providing advisory services to insurance company separate accounts supporting group annuity contracts issued to municipal entity retirement plans where the services they provide already require them to be registered as investment advisers.

- The term "municipal advisor" should not encompass registered broker-dealers marketing Insurance Contracts to municipal entity retirement plans.

- The term "municipal entity" should not include public pension plans or participant-directed plans utilizing Insurance Contracts for the investment of plan contributions.

- The Commission should clarify that the term "solicitation" as used in the Proposed Rules and Proposed Forms does not encompass the marketing of Insurance Contracts by broker-dealers to retirement plans established by municipal entities.

- The Commission should clarify that the municipal advisor regulatory regime does not apply to insurance companies issuing Insurance Contracts purchased by retirement plans established by municipal entities.

- The Commission should clarify that the municipal advisor regulatory regime does not apply to advice provided to participants in retirement plans established by

municipal entities, or to investor education information provided to such participants.

BACKGROUND

Types of Plans. Committee members include insurance companies that issue Insurance Contracts as funding vehicles for retirement plans established by governmental and municipal entities ("governmental employers") for their employees. These plans include plans under Section 457 ("457 plans") of the Internal Revenue Code (the "Code") and plans under Section 403(b) ("403(b) plans") of the Code, and can provide for contributions from both governmental employers and employees, or employees only. Employee contributions are generally implemented through salary reduction arrangements. Insurance Contracts for 457 plans generally qualify for an exemption from registration under the Securities Act of 1933, as amended (the "1933 Act"), in reliance on Section 3(a)(2) thereof. Insurance Contracts for 403(b) plans[3] generally are registered with the Commission under the 1933 Act (assuming they are deemed to be securities, such as variable annuity contracts). The governmental employers typically establish trusts or similar arrangements to hold assets contributed to and invested on behalf of the plans. Further, many governmental employers establish investment committees to make decisions regarding the funding arrangements for the investment of assets placed in the trust.

Intermediaries. Insurance companies issuing Insurance Contracts may offer them directly to governmental employers, or may offer them through intermediaries. The intermediaries through which they offer Insurance Contracts must be registered as broker-dealers with the Commission (unless they qualify for an exemption) and be members of the Financial Industry Regulatory Authority, Inc. ("FINRA").[4] These intermediaries also must be licensed as insurance agents under applicable state insurance laws. The Exchange Act and rules thereunder, as well as FINRA rules, apply to the activities of broker-dealers participating in the offering of Insurance Contracts. Thus, these intermediaries are already subject to an existing registration and regulatory regime for these activities.

Separate Accounts. Insurance Contracts issued by members of the Committee that are variable annuity contracts are supported by insurance company separate accounts. Assets in the separate accounts: (a) are managed by the insurer itself or by an investment adviser; (b) are invested in mutual funds managed by investment advisers; or (c) are invested in collective

[3] In some cases, insurance companies may issue individual contracts directly to the participants in a 403(b) plan arrangement, rather than a group contract to the plan custodian and certificates issued to the participants. For simplicity, the term "Insurance Contracts" as used in this letter refers to both individual and group versions of annuity contracts used in a 403(b) plan arrangement.

[4] We note that Section 15(a) of the Exchange Act exempts from the broker-dealer registration requirement a person whose broker-dealer activities are limited to the offering of securities that are "exempted securities" for purpose of Section 3(a)(12) of the Exchange Act. Section 3(a)(12), in turn, defines "exempted securities" as including any security arising out of a contract issued by an insurance company, issued in connection with certain qualified plans including governmental plans.

investment trusts maintained by banks. Separate accounts for variable annuity contracts utilized for 403(b) plans are generally registered with the Commission as investment companies under the Investment Company Act of 1940, as amended (the "1940 Act"); separate accounts for variable annuity contracts utilized for 457 plans generally qualify for an exemption from registration under the 1940 Act pursuant to Section 3(c)(11) thereof.

Recordkeeping and Other Services. Committee members and/or their affiliates also may provide recordkeeping and other administrative services to governmental retirement plans. In addition, in the case of participant-directed plans, services provided to plans may include the provision of investor education information to individual plan participants, consistent with the type contemplated by Department of Labor regulations[5] and a Commission staff no-action letter issued to the Department of Labor.[6] Such services may also include the provision of advice to participants for the allocation of their participant account balance among the investment options available under the governmental retirement plan. While there are different means of providing this kind of advice to participants, a common approach is to provide the advice in compliance with Department of Labor Advisory Opinion 2001-09A (also known as the "SunAmerica Opinion").[7] Significantly, under the terms and conditions of the SunAmerica Opinion, the plan service provider making the asset allocation advice available to plan participants must hire an independent financial expert to serve as the source of the investment advice. Further, the plan service provider cannot change or affect the advice and must compensate the financial expert without regard to the type or brand of investments recommended. In other words, the plan service provider performs an active role in administering the advisory service and promoting its availability, but does not itself generate the advice.

THE SCOPE OF PROPOSED RULE 15BA1-1 IS OVERLY BROAD

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[8] 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. With that observation in mind, the Committee would expect the Proposed Rules to focus on the activities of unregulated persons who should be subjected to the new

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[5] 29 CFR 2509.96-1.

[6] Department of Labor, Commission No-Action Letter (avail. Dec. 5, 1995) available at http://www.sec.gov/divisions/investment/noaction/1995/dol120595.pdf.

[7] Department of Labor Advisory Opinion 2001-09A (Dec. 14, 2001) available at http://www.dol.gov/ebsa/regs/AOs/ao2001-09ahtml. In the advisory opinion, the Department of Labor opined favorably on a structure where a retirement platform provider outsourced to an independent financial expert the design, control and operation of a computerized investment advice program considering both proprietary and non-proprietary investment options. The advisory opinion allows retirement plan service providers to provide advice consistent with the Employee Retirement Income Security Act's ("ERISA") prohibited transaction provisions by retaining an independent third party to serve as the source of the advice if, among other things, the third party's compensation does not vary based on which securities are recommended. This so-called "SunAmerica" approach has been adopted by many providers.

[8] Proposing Release, Introduction.

regulatory regime. However, the Proposed Rules would appear to apply the municipal advisor registration regime to the broker-dealers marketing Insurance Contracts to governmental retirement plans and, as discussed below, possibly also to the investment advisers managing assets underlying those contracts – persons already subject to an existing registration and regulatory regime administered by the Commission.

An analysis of the legislative history of the Dodd-Frank Act reveals that Congress did not intend to impose the municipal advisor regulatory regime on persons involved in the marketing and asset management of funding vehicles for governmental retirement plans, particularly where they are already subject to an existing regulatory regime administered by the Commission. The legislative history of the House and Senate bills that preceded the adoption of the Dodd-Frank Act reflect a primary focus on the need for municipal financial advisor regulation due to the problems experienced in the municipal bond market – not due to any issues relating to governmental retirement plans.[9] For example, the Senate Report[10] explains that Section 975 strengthens oversight of the municipal market securities and broadens current municipal securities protections to cover previously unregulated market participants and previously unregulated financial transactions with states, counties, cities and other municipal entities. In other words, if a person's advisory activities or solicitation activities, vis-à-vis a municipal entity, are already subject to existing regulation under the federal securities laws, then that person was not intended to be reached by the new municipal advisor regulatory regime. There is no evidence that Congress wanted firms already subject to regulation for their activities vis-à-vis municipal entities to be subject to the municipal advisor regulatory regime for the very same activities.

Even if we consider the views expressed by the Municipal Securities Rulemaking Board ("MSRB") for legislative reform in the years leading up to the adoption of the Dodd-Frank Act, we see no articulation of a need to extend the regulatory reach to the funding vehicles for governmental retirement plans. For example, in 2009, the MSRB issued a report focused on the premise that "the majority of financial advisors is unregulated and operates in the public sphere without any legal standard or regulatory accountability," including independent financial advisors, swap advisors, and brokers of guaranteed investment contracts and other investment products purchased with proceeds from municipal bond offerings.[11] In noting its existing limited regulatory role in regulating brokers, dealers, and municipal securities dealers, the MSRB argued for regulatory oversight of unregulated market participants similar to the mandate for brokers,

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[9] H.R. Rep. No. 111-687 (2010). This report cites Commission Office of Municipal Securities Chief Martha Mahan Haines' hearing testimony in May 2009 before the House Financial Services Committee which focused on the need for legislation due to the impact on the municipal bond market of poor advice and misleading disclosure documents prepared by unqualified municipal financial advisers and the participation by financial advisors with conflicts of interest or engaged in pay-to-play activities.

[10] S. Rep. No. 111-176, at 147 (2010) (the "Senate Report).

[11] "Unregulated Municipal Market Participants—A Case For Reform" (the "MSRB Report"), the Municipal Securities Rulemaking Board, at p. 3 (April 2009). The MSRB Report is available at: http://msrb.org/News-and-Events/Press-Releases/Press-Releases/-/media/Files/Special-Publications/MSRBReportonUnregulatedMarketParticipants_April09.ashx.

dealers, and municipal securities dealers that was adopted in 1975. The MSRB did not argue for regulatory oversight of persons already regulated.[12]

As noted above, broker-dealers engaging in the marketing and distribution of Insurance Contracts to governmental retirement plans are already subject to regulation by the Commission and FINRA for these very same activities. In addition, investment advisers providing advisory services to separate accounts supporting variable annuity contracts issued to governmental retirement plans are already regulated under the Advisers Act. Subjecting these regulated entities to municipal advisor regulation would add another layer of regulation, an effect recognized in the Proposing Release.[13] The consequence of imposing another layer of regulation on the marketing and distribution of Insurance Contracts to governmental retirement plans would be costly both in terms of the financial obligations to fulfill such requirements and in terms of additional resources that would be required to be devoted to such efforts, with no corresponding benefit to, or protection of, municipal entities. The Committee submits that the benefits and protections of a regulatory scheme are already provided by virtue of the existing regulatory schemes to which brokers, dealers, municipal securities dealers, and investment advisers with respect to the Insurance Contracts are currently subject. Moreover, as noted in the Senate Report, in adopting Section 975 of the Dodd-Frank Act, 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."[14] 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."[15] In short, Congress sought to put unregulated municipal advisors on par with regulated broker-dealers, not to add to the regulation of broker-dealers.

The Committee thus urges the Commission to avoid subjecting persons (specifically, brokers, dealers, municipal securities dealers, and investment advisers) to new regulation for activity that already is subject to extensive regulation. The Committee notes also that, excluding such persons from municipal advisor regulation would demonstrate consistency with the requirements imposed upon the Commission by Section 3(f) of the Exchange Act, which requires the Commission to consider, in addition to the protection of investors, whether rulemaking would promote efficiency, competition and capital formation.[16] Excluding such persons would also further the purposes of Section 23(a)(2) of the Exchange Act, which prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[17] The Committee submits that

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[12] The MSRB Report at p. 3.
[13] Proposing Release, Introduction.
[14] The Senate Report at p. 148.
[15] Id.
[16] 15 U.S.C. 78c(f). The Commission is required to make this finding whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest.
[17] 15 U.S.C. 78w(a)(2).

imposing an additional layer of regulation in the form of municipal advisor regulation on those persons is not necessary or appropriate because it would neither further the goal of investor protection nor promote efficiency, competition and capital formation, all of which must be taken into consideration by the Commission in its rulemaking efforts under the Exchange Act.

COMMENTS ON PROPOSED RULES AND PROPOSED FORMS

PROPOSED DEFINITION OF INVESTMENT STRATEGIES SHOULD NOT APPLY TO INSURANCE COMPANY SEPARATE ACCOUNTS

Proposal. Section 15B(e)(3) of the Exchange Act, as added by Section 975 of the Dodd-Frank Act, defines the term "investment strategies" as including plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments.[18] Proposed Rule 15Ba1-1 also would further define the term "investment strategies" to include "plans, programs, or pools of assets that invest funds held by or on behalf of a municipal entity." The Proposing Release explains that this term thus would encompass pension contributions from employees and state and local government employers.[19] The Proposing Release notes that persons giving advice to a pooled investment vehicle in which a municipal entity has invested funds along with other investors that are not municipal entities would not require such person to register as a municipal advisor,[20] potentially implying that a pooled investment vehicle whose investors are limited to one or more municipal entities, such as governmental retirement plans, would be deemed "investment strategies." The Proposing Release requests comment on whether the Commission should modify or clarify this interpretation in any way.[21] The Proposing Release also requests comment on whether the interpretation should be modified to apply only if the primary investors in the pooled vehicle are not municipal entities.[22]

Committee Comment. The Committee requests that the Commission clarify that its proposed interpretation of "investment strategies" does not apply to separate accounts supporting Insurance Contracts or their underlying investment vehicles. As discussed in the "Background" section above, the variable annuity contracts issued by members of the Committee are supported by insurance company separate accounts. In some cases, an insurance company's separate account may be limited solely to a single group variable annuity contract issued to a single governmental retirement plan, or limited solely to variable annuity contracts issued to multiple governmental retirement plans. In either case, though, the insurance company separate accounts could be limited to Insurance Contracts issued only to governmental retirement plans. If the Commission determines to adopt its proposal to define "municipal entity" as including 457 plans

[18] 15 U.S.C 78o-4(e)(3).
[19] Proposing Release, text accompanying nn. 97-98.
[20] Proposing Release, text accompanying n. 98.
[21] Proposing Release, Request for Comment following Section II.A.1.
[22] Id.

and 403(b) plans, these insurance company separate accounts could then be viewed as pooled investment vehicles limited to municipal entity investors, namely, the 457 plans and 403(b) plans. As noted above, the proposed definition of "investment strategies" and the views expressed in the Proposed Release could be read to imply that an insurance company separate account whose assets are limited to contributions from Insurance Contracts held by governmental retirement plans is an "investment strategy." The Committee has found no indication in the legislative history that Congress intended such a result. The funds invested in these Insurance Contracts are not the proceeds of municipal securities; they are employer and employee contributions. In the case of employee contributions, the funds are derived from salary reduction arrangements – completely unrelated to municipal financing. Accordingly, the Committee requests clarification that the proposed definition of "investment strategies" does not include separate accounts supporting variable annuity contracts (and their underlying investment vehicles) offered by Committee members to municipal entities, even if the separate account assets are limited only to contributions from municipal entities.

MUNICIPAL ADVISOR REGISTRATION SHOULD NOT APPLY TO REGISTERED INVESTMENT ADVISERS

Proposal. Section 15B(e)(4)(C) of the Exchange Act, as added by Section 975 of the Dodd-Frank Act, excludes from the definition of municipal advisor "any investment adviser registered under the Advisers Act, or person associated with such investment advisers who are providing investment advice." Proposed Rule 15Ba1-1(d)(2)(ii) would clarify that the exclusion for an investment adviser would apply only to the extent that the advisory services provided by the investment adviser would subject the investment adviser to regulation under the Advisers Act. The Proposing Release explains that the Commission interprets "advice" in this instance to include any activity that constitutes advice subject to the Advisers Act.[23] In this regard, the Proposing Release references a Commission staff legal bulletin explaining that a financial advisor who merely advises municipal issuers regarding the structuring of their financing would not be considered to be engaged in advisory services regulated under the Advisers Act.[24] Yet, the Proposing Release also states that the Commission believes it was Congress' intent to include persons that provide advice to pools of assets that invest funds held by public pension plans.[25] In this respect, the Proposing Release appears to be expressing contradictory interpretations.

Committee Comment. The Committee requests that the Commission clarify that its interpretation regarding municipal advisor registration for registered investment advisers does not apply to investment advisers providing advisory services to separate accounts supporting Insurance Contracts or their underlying investment vehicles. As discussed in the "Background" section above, Committee members issue variable annuity contracts that are supported by insurance company separate accounts whose assets are managed by an investment adviser, or are

[23] Proposing Release at n.116.
[24] See Division of Investment Management: Staff Legal Bulletin No. 11 (Sept. 19, 2000), available at http://www.sec.gov/interps/legal/slbim11.htm.
[25] Proposing Release, text accompanying nn. 97-98.

invested in mutual funds managed by investment advisers. These investment advisers are registered with the Commission under the Advisers Act and have been so registered because their activities require registration under the Advisers Act. The Committee submits that these activities are not at all the type of municipal financing structuring services addressed in the Commission staff bulletin. The Committee requests that the Commission confirm that municipal advisor registration will not apply to Commission-registered investment advisers providing investment advice to separate accounts supporting Insurance Contracts, or their underlying investment vehicles, where that advice triggers investment adviser registration under the Advisers Act.

PROPOSED DEFINITION OF MUNICIPAL ADVISOR SHOULD NOT ENCOMPASS REGISTERED BROKER-DEALERS OFFERING INSURANCE CONTRACTS

Proposal. Section 15B(e)(4) of the Exchange Act, as added by Section 975 of the Dodd-Frank Act, in defining the term "municipal advisor," explicitly excludes a broker, dealer or municipal securities dealer acting as an underwriter.[26] However, Proposed Rule 15Ba1-1 would provide that the exclusion for brokers, dealers and municipal securities dealers would be further limited solely to their activities as underwriters of municipal securities, which would drastically reduce the scope of the exclusion. The Proposing Release notes the Commission's belief that Congress provided such an exclusion for broker-dealers in connection with the issuance of municipal securities because underwriting activities are already subject to MSRB rules.[27] However, the Proposing Release requests comment on whether this interpretation is appropriate.[28]

Committee Comment. The Committee believes that the Commission's interpretation, as reflected in Proposed Rule 15Ba1-1, is not appropriate in light of Congressional intent. To the contrary, the Committee believes that Congress intended to exclude the activities of brokers, dealers and municipal securities dealers when acting in an underwriting capacity, that is, when participating in an offering of securities, regardless of the type of securities involved in the offering. Indeed, it seems illogical to conclude that Congress did not intend broker-dealers to be subject to the municipal advisor regulatory regime when acting as an underwriter for municipal securities but to be subject to that regime when acting as an underwriter for a different type of offering simply because a municipal entity happened to purchase securities in the offering.[29]

The Committee is concerned about the Commission's interpretation because it impacts broker-dealers offering Insurance Contracts to governmental retirement plans. Broker-dealers doing so are participating in an offering – the offering of Insurance Contracts. Their activities in

[26] 15 U.S.C. 78o-4(e)(4)(C), providing the definition of municipal advisor does not include a broker, dealer, or municipal securities dealer serving as an underwriter (as defined in Section 2(a)(11) of 1933 Act).
[27] Proposing Release at n. 107.
[28] Proposing Release, Request for Comment following Section II.A.1.
[29] The Committee urges the Commission to consider the interpretative suggestions relating to the broker-dealer exclusion as set forth in the letter from the Securities Industry and Financial Markets Association to Martha Haines, Assistant Director and Chief, Office of Municipal Securities, Commission, dated November 15, 2010.

doing so are already subject to regulation under provisions of the Exchange Act applicable to broker-dealers and under FINRA rules applicable to member firm participation in offerings of variable contracts and other types of insurance contracts. The Committee recommends that the Commission revise Proposed Rule 15Ba1-1 to clarify that the exclusion is available to a broker-dealer acting as an underwriter or distributor for a security purchased by a governmental retirement plan and engaged in routine selling activities inherent in such participation, including promotional activities and purchase recommendations.

PROPOSED DEFINITION OF MUNICIPAL ENTITY SHOULD NOT INCLUDE GOVERNMENTAL RETIREMENT PLANS

Proposal. Section 15B(e)(8) of the Exchange Act, as added by Section 975 of the Dodd-Frank Act, provides that the term "municipal entity" means "any State, political subdivision of a State, or municipal corporate instrumentality of a State, including (A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) 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; and (C) any other issuer of municipal securities."[30] The Proposing Release sets forth the Commission's view that the term "municipal entity" as used in Section 15B of the Exchange Act would include public pension funds, local government investment pools and other state and local governmental entities or funds, as well as participant-directed investment programs or plans such as 403(b) and 457 plans.[31] This interpretation would cause pensions plans to be included in the definition of municipal entity. The Proposing Release requests comment on whether it is appropriate to clarify that the definition of the term "municipal entity" would include "public pension funds" and "participant-directed investment programs or plans such as 529, 403(b), and 457 plans."[32]

Committee Comment. The Committee believes that it is not appropriate to define the term "municipal entity" to include public pension plans or participant-directed plans utilizing Insurance Contracts for the investment of plan contributions. These plans have nothing to do with raising funds for a municipal entity, or investing proceeds from an offering of municipal securities. Rather, they pertain solely to the terms of the employment relationship between the municipal entity and its employees. Indeed, once the funds are contributed to a governmental plan, they are no longer the property of or held for the benefit of the municipal entity that established the plan. According to Section 457 of the Code, assets contributed to a 457 plan must be held in trust for the exclusive benefit of participants and their beneficiaries. In the case of 403(b) plans, the contracts or accounts are purchased for and owned by the individual participants and not a municipal entity.

The Committee believes that its previous comments demonstrate why the municipal advisor regulatory regime should not be applied to 457 plans and 403(b) plans. If the

[30] 15 U.S.C. 78o-4(e)(8).
[31] Proposing Release, text accompanying nn. 82-83.
[32] Proposing Release, Request for Comment following Section II.A.1.

Commission were to modify its proposal so that the term municipal entity did not include 457 plans and 403(b) plans, the Committee's concerns discussed above regarding the impact of the Proposed Rules on separate accounts, broker-dealers and investment advisers for Insurance Contracts would be mooted.

THE TERM "SOLICITATION" IN THE PROPOSED RULES AND PROPOSED FORMS SHOULD BE CLARIFIED

Proposal. Section 15B(e)(4) of the Exchange Act, as added by the Dodd-Frank Act, defines the term "municipal advisor" as including a person that undertakes a solicitation of a municipal entity or obligated person.[33] Section 15B(e)(9), in turn, defines the phrase "solicitation of a municipal entity or obligated person" to mean "a direct or indirect communication with a municipal entity or obligated person made by a person, for direct of indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining and engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to on behalf of a municipal entity."[34] The Dodd-Frank Act does not provide a definition of "solicitation," nor is there an existing definition of the term "solicitation" in the Exchange Act. However, the term "solicitation" is used in a rule adopted under the Advisers Act, aptly named "Cash Payments for Client Solicitations."[35]

Committee Comment. The Committee believes that, in using the term "solicitation," Congress was concerned about persons acting as solicitors for broker-dealers, investment advisers and municipal advisors seeking to be retained by a municipal entity for municipal advisory services. The Committee believes that Congress did not intend the term to apply to registered broker-dealers participating in the offering of securities and of other investments that are marketed 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 simply seeking to sell the security to be issued in the offering, and is not seeking to "obtain" or "retain" an engagement to provide services after the investment is purchased. The Committee notes that, under Commission staff guidance, persons soliciting investors to invest in funds are subject to broker-dealer registration requirements and are not deemed to be solicitors for advisers to those funds.[36] The Committee urges the Commission to acknowledge that the use of the term "solicitation" is limited to soliciting for broker-dealers, investment advisers and

[33] 15 U.S.C. 78o-4(e)(4)(A)(ii).
[34] 15 U.S.C. 78o-4(e)(9).
[35] See Rule 206(4)-3 under the Advisers Act.
[36] See SEC No-Action Letter to Mayer Brown, LLP (avail. July 28, 2008) and Compliance Guide to the Registration and Regulation of Broker and Dealers, Securities and Exchange Commission, Division of Market Regulation, (Jun. 2, 1999) at p. 2; available at http://www.sec.gov/pdf/bdguide.pdf.

municipal advisors seeking to be retained by a municipal entity for municipal advisory services, and does not extend to routine broker-dealer selling activities in connection with securities offerings, which are already subject to robust regulation. The Committee further urges the Commission to recognize that broker-dealers, in engaging in routine sales activities in connection with the distribution of securities for which they are acting in an underwriter or distribution role for purposes of the 1933 Act – sometimes referred to colloquially as "solicitation activities" – are not engaging in solicitation activity of the type contemplated by Section 975 of the Dodd-Frank Act (including, but not limited to, Section 15B(e)(9) of the Exchange Act).

OTHER COMMENTS

INSURANCE COMPANIES ISSUING INSURANCE CONTRACTS

The Committee notes that the Proposing Release does not discuss the role of insurance companies that issue Insurance Contracts to governmental retirement plans. As issuers of Insurance Contracts purchased by governmental retirement plans, insurers are functionally "counter-parties" to the plans vis-à-vis their Insurance Contracts. The Committee believes that there is no Congressional intent to apply the municipal advisor regulatory regime to insurance companies issuing Insurance Contracts to governmental retirement plans, simply because their Insurance Contracts may be used as the funding vehicles for these plans. The Committee requests that the Commission confirm that the municipal advisor registration regime does not apply to issuers, such as insurance companies, and their employees, of Insurance Contracts issued to governmental retirement plans, to the extent that such plans are deemed to be municipal entities. The Committee notes that such an approach would be consistent with the long-standing position of the Commission that an issuer is not a broker-dealer for purposes of the Exchange Act.

PARTICIPANTS IN GOVERNMENTAL RETIREMENT PLANS

The Committee notes that the Proposing Release, in discussing 457 and 403(b) plans sponsored by municipal entities, does not mention plan participants. As discussed above in the "Background" section, services provided to participant-directed plans may include providing investor education information to individual plan participants and asset allocation advice. The Committee believes that Congress clearly did not intend to apply any part of the municipal advisor regulatory regime to persons that provide services to plan participants. However, to avoid any ambiguity on this issue, the Committee recommends that the Commission clarify that the municipal advisor regulatory regime does not apply to persons providing investment advice to individual participants in governmental retirement plans such as 403(b) plans or investor education information provided by broker-dealers or others to participants.

The Committee believes Congress did not intend services to individual participants to trigger registration as a municipal securities advisor. It is clear from the terms of the statute that Congress intended the municipal advisor regulatory regime to apply to municipal entities, and

not to individuals, particularly not to individuals who are participants in a governmental retirement plan. To stretch the definition of municipal entity to include individual participants in a governmental retirement plan would stretch the language of Section 975 of the Dodd-Frank Act beyond any reasonable interpretation. Moreover, the costs that would be imposed on service providers to comply with the municipal advisor regulatory regime would make the services cost-prohibitive. There is no indication in the legislative history that Congress intended Section 975 to apply in any way to individual participants in a governmental retirement plan. In short, the Committee strongly believes that interpreting Proposed Rule 15Ba1-1 to apply to investor education and asset allocation services provided to individual participants is far beyond the scope of Congressional intent.

CONCLUSION

The Committee 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 so that the municipal advisor regulatory regime is not applied to issuers and sellers of Insurance Contracts that serve as funding vehicles for retirement plans established by municipal entities, and investment advisers who provide advice in connection with such Insurance Contracts or their underlying investment vehicles.

The Committee appreciates the opportunity to comment on the Proposing Release and would be happy to meet with Commission staff to elaborate on the comments made in this letter. 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

BY: _____
Clifford E. Kirsch

BY: _____
Michael B. Koffler

BY: _____
Susan S. Krawczyk

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