NAIFA

NATIONAL ASSOCIATION OF
INSURANCE AND FINANCIAL ADVISORS

GOVERNMENT
RELATIONS DEPARTMENT

2901 Telestar Court
PO Box 12012
Falls Church, VA
22042-1205
www.naifa.org

703/770-8100

703/770-8194-FAX

GARY A. SANDERS
VICE PRESIDENT - SECURITIES
& STATE GOV'T RELATIONS
(703) 770-8192
GSANDERS@NAIFA.ORG

June 13, 2011

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

Re: Registration of Municipal Advisors
[Release No. 34—63576 File No. S7—45—10]

Dear Ms. Murphy:

This letter presents the views of the National Association of Insurance and Financial Advisors ("NAIFA") regarding the Security and Exchange Commission's ("SEC" or the "Commission") Proposed Rule on Registration of Municipal Advisors ("Proposed Rule").[1] NAIFA respectfully requests consideration of this letter despite its submission after the close of the comment period.

For the reasons discussed below, NAIFA believes the Proposed Rule would force more professionals to register with the Commission as municipal advisors than the SEC is permitted to require based on the plain language of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act").

NAIFA comprises more than 700 state and local associations representing the interests of 200,000 members and their associates nationwide. NAIFA members focus their practices on one or more of the following: life insurance and annuities; health insurance and employee benefits; multiline; and financial advising and investments. Founded in 1890 as the National Association of Life Underwriters, NAIFA is the nation's largest financial services membership association. The vision of NAIFA is to protect and promote the critical role of insurance in a sound financial plan and the essential role provided by professional agents and advisors. NAIFA's mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of our members who assist the public in achieving financial security and independence. Approximately two-thirds of all NAIFA members are licensed as registered representatives of broker-dealers and market and service mutual funds, and a sizable percentage are investment advisor representatives.

---

[1] 76 Fed. Reg. 824 (Jan. 6, 2011).

Section 975 of Dodd-Frank makes it unlawful for a "municipal advisor" to provide advice to or on behalf of a "municipal entity" with respect to "municipal financial products" or the issuance of municipal securities unless that advisor is registered as a municipal advisor with the SEC. The Proposed Rule effectuating this statutory requirement would force a number of professionals to register with the SEC as municipal advisors who—based on the language of Dodd-Frank—should not be required to do so.

Dodd-Frank defines "municipal advisors" to include any person who provides advice to or on behalf of a "municipal entity" or obligated person with respect to "municipal financial products,"[2] which the Act defines as "municipal derivatives, guaranteed investment contracts, and investment strategies."[3] The term "investment strategies" is defined explicitly in Dodd-Frank 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."[4]

Thus, based on the clear language of Dodd-Frank, "investment strategies" is defined as the provision of advice for the investment of the *proceeds of municipal securities.* The Commission, however, proposes to interpret the term "investment strategies" to include advice to plans, programs, or pools of assets that invest funds held by or on behalf of a municipal entity, or the recommendation or brokerage of municipal escrow investments.[5] This would include such funds as a 529 college savings plan, public pension plans, or Local Government Investment Pools ("LGIPs"). This is not an insignificant interpretation, as many professionals—including NAIFA members—advise 529 plans, pension plans, or LGIPs, but do not advise municipal entities regarding investing the proceeds of municipal securities. Under the clear reading of the statute, such professionals should not be required to register as municipal advisors; under the SEC's Proposal, they would.

In defending this broad interpretation, the Commission noted in the preamble to the Proposal that because the definition of "municipal entity" includes "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 Commission concluded that Congress intended to include in the definition of "municipal advisor" persons that provide advice with respect to any plans, programs, or pools of assets that invest funds held by, a municipal entity.[7]

---

[2] 15 U.S.C. 78o-4(e)(4).
[3] 15 U.S.C. 78o-4(e)(5).
[4] 15 U.S.C. 78o-4(e)(3).
[5] 76 Fed. Reg. 835.
[6] 76 Fed. Reg. 830, *citing* 15 U.S.C. 78*o*-4(e)(8)(B).
[7] 76 Fed. Reg. 830. The Commission notes in its preamble to the Proposed Rule that "to the extent a person is providing advice to a pooled investment vehicle in which a municipal entity has invested funds *along with other investors that are not municipal entities,* the pooled investment

However, the Commission failed to recognize that Dodd-Frank defines a municipal advisor as including persons who provide "advice to or on behalf of a municipal entity . . . *with respect to municipal financial products or the issuance of municipal securities.*" Under the Commission's interpretation of the term "investment strategies" (a component of "municipal financial products"), the italicized language above is superfluous. Indeed, the SEC looked solely to the definition of "municipal entity" without considering the subsequent qualifying language. One would be hard-pressed to articulate how the Commission's interpretation of "investment strategies" would differ if the italicized language above was not included in Dodd-Frank.

This result is in clear contravention of basic rules of statutory construction, specifically the rule against surplusage. The rule against surplusage is a statutory canon of construction that counsels courts to "give effect, where possible to every word of a statute."[8] Because of this "duty," courts are "reluctant" to adopt or validate an interpretation of a statute that renders any of its terms mere surplusage.[9]

In *Nati'l Credit Union Admin. V. First Nat'l Bank and Trust Co.*,[10] the Supreme Court held that the rule against surplusage is a traditional tool of statutory construction that can invalidate an agency's interpretation of a statutory provision that it administers. That case dealt with §109 of the Federal Credit Union Act, which stated that federal credit unions must be composed of members of "groups having a common bond of occupation or association" or "groups within a well-defined neighborhood, community, or rural district." The National Credit Union Administration ("NCUA") interpreted §109 to permit credit unions to be composed of multiple, unrelated employer groups. The Supreme Court held this to be an impermissible interpretation of the statute, finding that reading the statute to permit unrelated groups to join the same credit union "makes the phrase 'common bond' surplusage,"[11] and "reads the words 'shall be limited' out of the statute entirely." [12]

The Proposal expands the coverage of the rule requiring certain professionals to register as municipal advisors to the point that it is beyond the scope of Dodd-Frank's plain language. The Act clearly envisions municipal advisors required to register with the Commission as those who provide advice to municipalities on how to invest the proceeds of municipal securities. To expand the scope to include professionals who advise a fund or pool such as a public pension plan, a

---

vehicle would not be considered funds 'held by or on behalf of' a municipal entity and, therefore, the person providing advice to the pooled investment vehicle would not have to register as a municipal advisor." 76 Fed. Reg. 830 (emphasis added).

[8] *Duncan v. Walker,* 533 U.S. 167, 167 (2001).

[9] *Id.*

[10] 522 U.S. 479 (1998) (superseded by statute on other grounds).

[11] *Id.* at 501.

[12] *Id.* at 502.

529 college savings plan, or LGIP, violates a basic tenant of statutory construction and is otherwise inconsistent with a plain reading of the Act. Accordingly, we urge the Commission to revise its interpretation of the phrase "investment strategies" to conform to the language of Dodd-Frank before finalizing the Proposed Rule.

* * *

Again, NAIFA would appreciate your consideration of this letter. Please feel free to contact us to discuss this issue at any time.

Sincerely,

Gary Sanders

Gary A. Sanders
Vice President, Securities and State Government Relations