NEBRASKA INVESTMENT COUNCIL
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February 15, 2011

By email to rule-comments@sec.gov

Securities and Exchange Commission
Attn: Elizabeth M. Murphy, Secretary
100 F St., N.E.
Washington, DC 20549-1090

RE: ***File No. S7-45-10***

Dear Ms. Murphy:

I am the State Investment Officer of the Nebraska Investment Council ("NIC"), which is an instrumentality of the State of Nebraska. Pursuant to the Nebraska State Funds Investment Act, the NIC is responsible for the investment of state and county employee pension plan assets (defined benefit plans), selecting investment options for state and county employee benefit plans (defined contribution plans), investment of state assets, and the selection of investment options for participants of the state's 529 plan. The NIC is comprised of five Council members appointed by the Governor, and two ex-officio members, the State Treasurer (elected) and the Director of the Public Employee Retirement Board (non-elected). These comments are in response to the proposed Rule 17 CFR Parts 240 and 249 (File No. S7-45-10), which arise out of § 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which amends § 15B of the Securities and Exchange Act of 1934 (as amended, the "Exchange Act").

The proposed Rule is significant in two material respects. First, the Rule significantly expands the types of investment activities that the Securities and Exchange Commission (the "SEC" or "Commission") will oversee. This expansion of the SEC's authority is not supported by the Dodd-Frank Act. Second, the draft rule attempts to classify appointed board members of a municipal entity as "municipal advisors," while ex-officio members and elected board members would be exempt from the definition of "municipal advisor." This misplaced distinction is not grounded in any rational basis; all board members, as representatives of the municipal entity, should be excluded from the registration requirements.

<u>Section I – Municipal Securities</u>

The SEC has taken an interesting approach to interpreting Congress' intent as to the scope of the Dodd-Frank Act. Instead of simply covering municipal securities, as stated in the Dodd-Frank Act, the SEC proposes to broadly expand its authority to include plans, programs or pools of assets that invest funds held by or on behalf of a state, even though such assets are not connected to a municipal security. *See* Fed. Reg. Vol. 76, No. 4, Pg. 830. In interpreting the term "investment strategies," the Commission states it considered the statutory definition of "municipal advisor" and "municipal entity." *Id.* The SEC specifically relies upon the definition of "municipal entity," which includes "any plan, program or pool of assets sponsored or established by the state, political subdivision or municipal corporate instrumentality or agency, authority or instrumentality thereof." Based on this, the SEC concluded it was Congress' intent to include plans, programs or pools or assets that invest funds held by, or on behalf of, a municipal entity, such as a 529 college savings plan or public pension plan.

The SEC's interpretation is misguided and does not follow the rules of statutory interpretation. 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 supplied)

Exchange Act, § 15B(a)(1)(B). The term "municipal securities" was not changed by the Dodd-Frank Act and is still defined 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 . . . ." Exchange Act, § 3(29).

The term "security," which also remains unchanged by the Dodd-Frank Act, means any note, stock, Treasury stock, security feature, or other instrument commonly known as a security. Exchange Act, § 3(10). With respect to the grant of authority to the SEC over the "issuance of municipal securities," there has been no change under the Dodd-Frank Act to justify the expansion of the SEC's authority.

As noted by the Commission, under § 15B(a)(1)(B) the SEC's authority also extends to "municipal financial products." That term is defined in the Dodd-Frank Act as "municipal derivatives, guaranteed investment contracts and investment strategies." Exchange Act, § 15B(e)(5). The term "investment strategies" includes "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 agreements." Exchange Act, § 15B(e)(3). The Dodd-Frank Act could not be more clear; the plans and programs intended to be covered under the term "investment strategies" must relate to the proceeds of municipal securities.

Contrary to the interpretation by the SEC, the expansion by Congress of the definition of "municipal entity" was intended to capture the potential universe of municipal issuers, which could include a plan, program or pool of assets sponsored or established by the state; it was not intended to expand the types of assets regulated by the SEC. The underlying notion that the SEC is still regulating "municipal securities" should not be disregarded without a clear Congressional mandate, which must necessarily include a change to the definition of "municipal security."

Stepping back from the language of the Exchange Act and the Dodd-Frank Act, the SEC should examine its role and duty in regulating municipal securities. Municipal securities regulation was originally intended to regulate the issuance of investment instruments by a municipal entity under which the municipal entity is required to pay the investor in accordance with the terms of the instrument. State employee pension plans, 529 plans and assets invested by the state are not investment instruments issued by the state to investors. They were never intended to be, nor should they now be, regulated under the Exchange Act or under the Dodd-Frank Act. ERISA covers employee pension plans and government plans are specifically exempt from ERISA. The proposed rule seems to be an end-run around ERISA, now subjecting the fiduciaries of these state plans to federal oversight without a Congressional directive to do so. We strongly urge the SEC to restrict its interpretation of municipal securities and investment strategies covered under the Exchange Act to the plain and ordinary meaning of the terms set forth in the legislation.

Section II – Municipal Advisor.

The draft Rule proposes to require appointed members of the governing board of the municipal entity to comply with the registration requirements of the Exchange Act. However, the draft Rule proposes to exempt board members who are elected. *See* Fed. Reg. Vol. 76, No. 4, Pg. 834. The distinction between elected and appointed board members has no rational basis; instead, all board members, who, as a group, comprise the persons who govern the municipal entity, should be exempted.

Under the Frank-Dodd Act, the Exchange Act was amended by adding the term "municipal advisor." Exchange Act § 15B(e)(4). According to Congress, a "municipal advisor" is "a person (who is not a municipal entity or an employee of a municipal entity) . . .." Both the municipal entity and employees of the municipal entity are exempt from the registration requirements under the Dodd-Frank Act. Like a corporation, a municipal entity does not act by itself. It must work through its governing board.

The Dodd-Frank Act clearly intended the municipal entity, and those representing the municipal entity, to be exempted from the registration requirements. The remaining definition of municipal advisors makes clear why it was intended to apply only to third parties. The term "municipal advisor" applies to persons who "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, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues." (Emphasis supplied) In the plain and ordinary meaning of the term "advice," the term implies a recommendation provided by a third party. Typically people do not provide advice to themselves.

Like a board of directors is the face of a corporation, a board or council is the face of a municipal entity. Like a corporate board, the municipal entity board or council has full authority to act by and on behalf of a municipal entity. The board or council and the municipal entity are one and the same. The board does not "advise" itself with respect to the issuance of municipal securities. Instead, it relies upon the advice and recommendations of third-party advisors. These third-party advisors are the persons Congress intended to regulate, not the municipal entity itself, its board or employees.

The focus of the SEC draft Rule as to whether board members are elected or appointed is misplaced. That distinction has no bearing on whether board members are ultimately accountable to the municipal entity for their actions. NIC members under Nebraska law are held to a fiduciary standard of care, and the ex-officio members of the NIC, who do not vote, are not considered fiduciaries. NIC members are personally liable in cases of willful dishonesty, gross negligence or intentional violation of law. The Commission should not be concerned about the accountability of Council members to plan participants and taxpayers. If the responsibility for the actions of board members of a municipal entity is of concern, then Congress can address that issue by requiring the municipal entity and its representatives to register, but the SEC should not twist the definition of "municipal advisor" and apply it to the party that is being advised.

We rely upon volunteers to give generously of their time and expertise to serve on the NIC. Requiring board members to undergo the registration requirements would place a significant burden on the state's volunteer system and discourage qualified persons from serving the state. Please reconsider the draft Rule, limit its applications to "municipal securities," and exempt the municipal entity, its board or council and its employees, from the registration requirements.

Sincerely,

NEBRASKA INVESTMENT COUNCIL

Jeffrey W. States

Jeffrey W. States
State Investment Officer

cc: Gail Werner-Robertson, Chair Nebraska Investment Council

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