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November 21, 2012

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***"). We are writing to express our appreciation for the willingness of the Commissioners and their staff to meet with us and certain members of the Committee to discuss certain aspects of *Registration of Municipal Advisors* (the "***Proposing Release***"),[2] which requested comment on proposed new rules 15Ba1-1 through 15Ba1-7 and related forms (the "***Propose Rules***") under the Securities Exchange Act of 1934, as amended (the "***Exchange Act***"). The Proposed Rules 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 provides for a registration and regulatory regime for persons who are "municipal advisors."

The Committee appreciates the opportunity to follow-up on comments we previously submitted in response to the Proposing Release's request for comment (the "***Prior Comment Letters***").[3] In light of our recent meetings, the Committee offers the following additional comments that expand upon the Prior Comment Letters.

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[1] The Committee of Annuity Insurers is a coalition of 27 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.

[3] The Committee has submitted two comment letters in response to the Proposing Release's request for comments. *See* Letter from Clifford E. Kirsch, Michael B. Koffler, and Susan S. Krawczyk, on behalf of the Committee of Annuity Insurers, to Elizabeth M. Murphy (Sept. 20, 2011), *available at* http://sec.gov/comments/s7-45-10/s74510-

ADDITIONAL COMMENTS ON PROPOSED RULES

As discussed in our recent meetings and as set forth in the Prior Comment Letters, Committee members include insurance companies, broker-dealers, investment advisers and their affiliates that issue, sponsor or manage investments, including variable annuities, life insurance contracts, mutual funds, collective trusts and private funds that serve as investment options for retirement plans established by municipal entities for their employees ("***governmental retirement plans***"). These plans include retirement savings plans established by municipal entities under Sections 401(a), 403(b) and 457(b) of the Internal Revenue Code of 1986, as amended (the "***Code***"). The governmental retirement plans provide for contributions from governmental entities and/or their employees. Assets of governmental retirement plans are held in trusts or annuity contracts, as required by the Code.

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.[4]

The Proposing Release sets forth the U.S. Securities and Exchange Commission's (the "***Commission***") 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.[5] This interpretation would cause all governmental retirement plans to fall within the definition of municipal entity. We note, however, that the participants in these plans – the persons for whose benefit the plans are established – are employees of the municipal entities sponsoring the plans. Employees, though, are explicitly excluded from the definition of municipal entity by virtue of Section 15B(e)(4) of the Exchange Act, a point explicitly acknowledged in the Proposing Release.[6]

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."[7] There are several

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[4] 15 U.S.C. 78o-4(e)(8).

[5] Proposing Release, text accompanying nn. 82-83.

[6] Proposing Release, text accompanying n. 139.

[7] Proposing Release, Request for Comment following Section II.A.1.

important public policy reasons for defining the term "municipal entity" to exclude *defined contribution, individual account, participant-directed governmental retirement plans* ("***Plans***"). These reasons are discussed below.

- Plans do not engage in raising funds for municipal entities. Rather, Plans pertain solely to the terms of the employment relationship between municipal entities and their employees and state or local enabling statutes often require municipalities to establish Plans as a part of this relationship. Municipal entities are responsible for securing the funding for the Plans (and the deferred compensation that the Plans represent) in the same manner as all other employee benefits, including on-going payroll costs; the assets held in Plans should not be treated differently than other forms of employee benefits.

- Once the funds are contributed to a Plan, they are no longer the property of, or held for the benefit of, the municipal entity that established the Plan. According to the Code, Plan assets must be held in a trust or annuity contract for the exclusive benefit of participants and their beneficiaries. As individual account Plans, each participant's benefit is determined solely by the amounts contributed to and withdrawn from the participant's Plan account and the investment performance of the participant's Plan account.

- Plan assets are segregated from the municipal entity's assets and cannot be used for the economic benefit of the municipal entity that created the Plan. Nor can the economic condition of the municipal entity have an impact on assets that have been contributed to and placed into the Plan.

- While municipal entities determine the Plan investment options, they do not determine the ultimate investments for participants' Plan accounts. During the process by which Plans select investment options, intermediaries' communications with Plan sponsors are limited to discussing the investment options that the Plan sponsor or other fiduciary will decide to make available to Plan participants. The "real" investment decisions are made by those for whose benefit the Plans are established, the participants. In this respect, the ultimate investment decisions as to what to buy and sell and how to allocate their retirement funds are made by Plan participants and solely impact the participants (*i.e.*, <u>not</u> the municipal entity).

- Each participant in a Plan has his or her own separate account balance and has the ability to direct the investment of the assets in his or her account among the investment options that the Plan sponsor has chosen to make available under the Plan.

- Plans already have a sponsor or other authorized fiduciary that is responsible for acting in the Plans' best interest when selecting investment options for Plans, thereby limiting the benefits that would result from imposing the municipal advisor regulatory regime on those that interact with Plans.

- Since the options available in Plans are designed for retirement plan participants, the options typically consist of mutual funds, principal protected products and/or annuities that offer a mix of choices across the risk/return spectrum. The Plans do not offer as investment options swaps, variable rate demand obligations or other risky instruments that are involved in municipal financings.

- Broker-dealers, investment advisers and insurance companies already are subject to extensive regulatory regimes. The harms the Commission is trying to solve for with the Proposed Rules are not present in the context of Plans (which we note are defined to include only *defined contribution, individual account participant-directed governmental retirement plans*). Layering a new and different municipal advisor regulatory regime onto broker-dealers, investment advisers and/or insurance companies solely because they play a role in making Plan options available for selection by Plan sponsors will not result in any meaningful benefit to, or protection of, municipal entities since the ultimate purchase and sale decisions are made at, and experienced at, the underlying participant level (and do not impact the municipal entities).

CONCLUSION

The Committee strongly supports the Commission's goal of stamping out fraud in the municipal securities marketplace and regulating actors in the market that heretofore have provided advice to municipal entities and obligated persons without being subject to adequate regulation. However, the Committee remains concerned that the Commission intends to extend the municipal advisor regulatory scheme beyond that which was intended by Congress and beyond the harms the Dodd-Frank Act was designed to cure.[8] In the case of a Plan, once the funds are contributed to a Plan, they are no longer the property of or held for the benefit of the municipal entity that established the Plan. In addition, there is no risk to municipal assets and the ultimate investment decisions are solely made by, and experienced by, Plan participants. In such a situation, we submit that there would be minimal protection afforded to municipal entities

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[8] 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 investments that serve as options for governmental retirement plans. The legislative history of the House and Senate bills that preceded the adoption of the Dodd-Frank Act reflect a focus on the need for municipal financial advisor regulation due to the problems experienced in the municipal bond market. (H.R. Rep. No. 111-687 (2010). This report cites Commission Office of Municipal Securities Chief Martha Haines' 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 advisors and financial advisors' conflicts of interest and pay-to-play activities.) The Senate Report (S. Rep. No. 111-176, at 147 (2010)) 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. There is no evidence that Congress intended 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.

by imposing the municipal advisor regulatory regime on intermediaries who interact with Plans. In addition, such regulation might drive providers out of the Plan market due to increased regulatory burdens. The Committee therefore urges the Commission to reconsider the scope of the Proposed Rules in light of the comments offered in this letter, and make appropriate modifications and clarifications.

The Committee appreciates the opportunity to meet with the staff on the Proposing Release and would be happy to meet to elaborate on the comments made herein should the staff think such a meeting would be useful. 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 mbk
Clifford E. Kirsch

BY: Michael B Koffler
Michael B. Koffler

BY: Susan S. Krawczyk mbk
Susan S. Krawczyk

FOR THE COMMITTEE OF ANNUITY INSURERS

Appendix A

THE COMMITTEE OF ANNUITY INSURERS

Allstate Financial
AVIVA USA Corporation
AXA Equitable Life Insurance Company
Commonwealth Annuity and Life Insurance Company
(a Goldman Sachs company)
Fidelity Investments Life Insurance Company
Genworth Financial
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
ING North America Insurance Corporation
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Life Insurance Company of the Southwest
Lincoln Financial Group
MassMutual Financial Group
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
SunAmerica Financial Group
Symetra Financial
The Transamerica companies
TIAA-CREF
USAA Life Insurance Company